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No. 479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., and ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *Appellants*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

BRYCE REA, JR.
FREDERICK A. BABSON, JR.
919 Munsey Building
Washington 4, D. C.
Attorneys for Appellants

October 2, 1962

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia was handed down on June 7, 1962 is reported at 205 F. Supp. 592, and is set forth as Appendix A hereto.

The initial report of the Interstate Commerce Commission, Division 3, dated May 18, 1959 is reported at 306 I.C.C. 535 and set forth in Appendix B hereto. The order of the Interstate Commerce Commission dated September 24, 1959 denying plaintiffs' Petition for Reconsideration of the aforementioned report and order of Division 3 of the Commission is set forth as Appendix C hereto.

The order of June 23, 1960 of the Interstate Commerce Commission vacating its prior orders and reopening the proceedings for reconsideration is set forth as Appendix D hereto. The report of the Commission on reconsideration, dated December 19, 1960, is reported at 311 I.C.C. 773; said report and accompanying order are set forth as Appendix E hereto.

JURISDICTION

Suit in the court below was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321 to 2325 inclusive to set aside and annul an order of the Interstate Commerce Commission approving reduced rates published and filed with the Interstate Commerce Commission by Western Freight Association, heretofore a freight forwarder as defined by section 402(a)(5) of the Interstate Commerce Act (49 U.S.C. § 1002(a)(5)). The judgment of the three-judge District Court was docketed June 7, 1962, and notice of appeal was filed in that court by appellants here on August 3, 1962.

The jurisdiction of the Supreme Court to review this decision upon direct appeal from the District Court is conferred by 28 U.S.C. §§ 1253 and 2101 (b) and is sustained by the following decisions: *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Florida Lime and Avocado Growers* v. *Jackson*, 362 U.S. 73 (1960); *Minneapolis and St. L. R. Co.*

v. *United States*, 361 U.S. 173 (1959); *American Trucking Associations, Inc.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958); and *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

Statutes pertinent to this proceeding are as follows:

National Transportation Policy
49 U.S.C. preceding §§ 1, 301, 901 and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

DEFINITION

Section 402(a)(5) of the Interstate Commerce Act [49 U.S.C. § 1002(a)(5)]

"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to

part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compenstaion, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments; the services of a carrier or carriers subject to part I, II, or III of this Act."

Section 10(e) of the Administrative Procedure Act [5 U.S.C. § 1009(e)]

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

QUESTIONS PRESENTED

1. Whether the court below erred in dismissing the complaint on the ground that plaintiffs lack standing to seek judicial review of the challenged orders of the Commission.

2. Whether, in view of the definition of "freight forwarder" in Section 402(a)(5) of the Interstate Commerce Act (49 U.S.C. § 1002(a)(5)), a freight forwarder may lawfully hold itself out to the public

to perform and in fact perform in the usual and ordinary course of its business a transportation service that does not purport to require and in fact does not require it to assemble or consolidate or provide for assembling and consolidating or to perform or provide for the performance of break-bulk or to perform or provide for the performance of distributing operations with respect to the shipments transported by it.

3. Whether the National Transportation Policy is contravened when the Interstate Commerce Commission authorizes freight forwarders to hold themselves out to the public to perform and in fact to perform in the usual and ordinary course of their business a lesser service at reduced rates than the service of a freight forwarder as defined in 49 U.S.C. § 1002(a)(5), which lesser service relieves freight forwarders of the obligation to perform the functions which are the very essence of the role of freight forwarders in the national transportation system, and by which lesser service they duplicate the services of railroads and common carriers by motor vehicles to their detriment.

STATEMENT OF THE CASE

Western Freight Association is a freight forwarder rendering service pursuant to a permit issued by the Interstate Commerce Commission (hereinafter, Commission) under section 410 of the Interstate Commerce Act (49 U.S.C. § 1010) between points in so-called Official Territory (generally the territory east of the Mississippi River and north of the Ohio and Potomac rivers) and points on the Pacific Coast. By a filing with the Commission under Section 405 of the Interstate Commerce Act (49 U.S.C. § 1005), it proposed to establish a tariff rule providing reduced rates to

points on the Pacific Coast on single shipments of minimum weights ranging from 20,000 to 30,000 pounds. Upon protest of appellants, among others, the Commission, under authority vested in it by Section 406 (e) of the Act (49 U.S.C. § 1006(e)), suspended the rates until May 21, 1959 and instituted an investigation of their lawfulness.

On May 18, 1959, Division 3 of the Commission, having omitted an initial decision by the examiner who presided at the hearing, issued a report finding the rates lawful and entered an order discontinuing the proceeding. On June 23, 1959, appellants filed a Petition for Reconsideration by the entire Commission of the report and order of Division 3. On September 24, 1959 this petition was denied. On June 3, 1960 appellants filed a complaint with the United States District Court for the District of Columbia from whose order this appeal is taken, seeking to have the Commission's orders set aside; whereupon on June 23, 1960 the Commission entered an order vacating its prior orders and reopening the proceeding for reconsideration because "the report and orders do not adequately dispose of all relevant issues." On December 19, 1960 the Commission issued its report on reconsideration and again entered an order discontinuing the proceeding. Thereafter, on January 3, 1961, appellees filed an answer to appellants' complaint in the United States District Court for the District of Columbia.

After entertaining briefs and argument, the statutory three-judge court which convened to hear the case rendered its opinion which (1) held that plaintiffs lacked standing to maintain the action and (2) assumed *arguendo* that it was in error on the issue of standing

and further held on the substantive issue that the order of the Commission was lawful "for whatever that may be worth." (205 F. Supp. at 594)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Plaintiffs' Standing to Sue

The decision of the court below that plaintiffs lacked standing to sue in that court presents a substantial question worthy of this Court's plenary consideration. The court below was of the opinion that "whatever novel competitive effects, if any, may flow from the Commission's order, it will not affect the associations but only some of their individual members" and that, therefore, any injury to plaintiff associations would be such an "injury for which courts have been reluctant to give relief. . . ." The court appeared to concede that the motor carrier members of plaintiff associations may well suffer "adverse economic effects" from the Commission's order. (205 F. Supp. at 593).

While conceding that plaintiffs' member carriers may suffer adverse economic effects from the Commission's order, the court below denied plaintiffs standing to maintain the action by citing *Hines Yellow Pine Trustees* v. *United States*, 263 U.S. 143 (1923) and *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249 (1930). Neither of those cases involved a suit in a representative capacity, much less by an association of carriers subject to regulation by the Interstate Commerce Commission. Instead, each case involved a shipper or shippers complaining that the Commission had removed an advantage which they had formerly held over their competitors; and each of those cases appears to have been bottomed on an implicit determination by the Court that the complaining shippers were not

unjustly discriminated against by the rates or practices required by the Commission's order.

Although the appellants here were obviously suing in a representative capacity for their members and in fact argued their right to do so on brief to the court below, the court nowhere discussed plaintiffs standing to sue in a representative capacity or the law pertaining thereto. Instead, it looked only to plaintiff associations, as separate entities, for determination of sufficient injury to maintain the suit.

We submit that there are at least three capacities in which appellants had the right to maintain the action below: first, in a representative capacity for their members; second, in their own right as separate entities; and third, under the so-called Sanders doctrine.[1]

First: Even where an association asserted the personal constitutional rights of its members, and despite the doctrine that constitutional adjudication should where possible be avoided, this Court held that the association was:

> "the appropriate party to assert these rights, because it and its members are in every practical sense identical. The association, which provides in its constitution that 'any person who is in accordance with its principles and policies * * *' may become a member is but the medium through which its individual members seek to make more effective the expression of their own views." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958).

The Court of Appeals for the District of Columbia Circuit has recognized the right of an association to

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[1] *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), discussed *infra*.

sue in a representative capacity for its members. *MacArthur Liquors, Inc. v. The Palisades Citizens Ass'n, Inc.*, 265 F. 2d 372, 374 (1959), where the court found that the individual members of the plaintiff association had sufficient interest to sue and that, therefore, "the association has standing to protect their interests." It is interesting to note that Circuit Judge Burger, who wrote the opinion of the court below in this case, concurred in the opinion of the court in the *MacArthur Liquors* case, *supra*, stating: "I agree with all that Judge EDGERTON has said . . . ," except on a point not pertinent here. The District Court for the District of Columbia has likewise recognized the principle here urged by plaintiffs. In *Archbold v. McLaughlin*, 180 F. Supp. 175, 180 (1960), the court stated:

> "Some of the proposed intervenors are organizations. It has been held that where the rights of individual members of an association are involved, the association has standing to sue to protect their interests," citing the *MacArthur Liquors*, and *N.A.A.C.P.* cases, *supra*.

In *National Union of Elec. Workers v. United States*, 280 F. 2d 645 (D.C. Cir. 1960), *reversed on other grounds sub nom Power Reactor Dev. Corp. v. International Union of Elec. Workers*, 367 U.S. 396 (1961) a group of labor unions appealed action of the Atomic Energy Commission permitting construction of a reactor, on the grounds that it imperiled the safety of an area in which members of the union, among others, lived and that consequently the economic interests of the individuals and the union were affected. A majority of the circuit court held that the unions were aggrieved parties. In its grant of *certiorari*, this Court excluded consideration of this issue, causing at

least one prominent observer to note that, "it would appear thus that the plaintiff's standing was not thought to be 'jurisdictional.'"[2]

The court below drew a distinction between the interest required to establish "persons aggrieved" within the meaning of statutes granting such persons standing to sue, on the one hand, and, on the other, that which is "*ordinarily* required in injunction suits to restrain actions by officials alleged to be unlawful." (Court's emphasis). Without explaining what it meant, the court ruled that as to the plaintiffs here, "The requirements of standing which 'ordinarily apply' are the requirements to be met," citing *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah 1960). The *Utah Citizens* opinion contains no indication of the size or nature of the membership of the association which brought suit there or any information whatever concerning its duties to or its relationship with its members. In holding that the Utah Citizens Rate Association possessed no "legal right or interest that would be injuriously affected" by the order of the Commission which required certain railroads to increase their rates and charges for intrastate transportation within the state of Utah, the court relied upon *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U.S. 479 (1930) and *Alexander Sprunt & Son, Inc.* v. *United States*, 284 U.S. 249, *supra*, neither of which involved a suit by an association much less one whose members were conceded to be adversely affected by the Commission order challenged.

Under Section 10(c) of the Administrative Procedure Act, appellants' members would plainly be entitled

[2] Jaffe, STANDING TO SECURE JUDICIAL REVIEW: PRIVATE ACTIONS, 75 Harv. L.R. 255, 274 (1961).

to maintain the present action as parties "adversely affected" by agency action. Professor Davis states that: "Although the legislative history is not entirely free from conflicting views, the part of the legislative history that is both clear and authoritative is the statement made by the committees of both the Senate and the House. . . . 'This subsection confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute.'" (Emphasis added). 3 DAVIS, ADMINISTRATIVE LAW TREATISE, § 22.02, pp. 211-12 (1958).

Not only are appellants' members adversely affected by the challenged order of the Commission, but they have suffered a "legal wrong" within the meaning of section 10(e) of the Administrative Procedure Act. The Interstate Commerce Act delineates the role of each of the various modes of transportation which go to make up the national transportation system. Thus, when the Commission improperly enlarges the role of one of those modes by permitting it to perform functions not authorized by, and in fact contrary to, the expressions of Congress, the other modes of transportation are to that extent legally wronged by the agency action.

Furthermore, the appellants herein and their members are "aggrieved" within the meaning of a relevant statute, as those terms are used in section 10(e) of the Administrative Procedure Act. The National Transportation Policy as expressed by Congress (49 U.S.C., preceding §§ 1, 301, 901, and 1001) provides for "fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each. . . ." Thus appellants and

their members are denied the benefit of this provision of law and are, therefore, aggrieved when the Commission improperly and unlawfully permits a competing mode of transportation to enlarge its functions and role in the transportation system and thereby encroach upon and destroy the inherent advantages of appellants' member carriers.

The question here might be difficult if appellants were not expressly authorized to represent their members, for "the cases go both ways on the question whether one person who is not the authorized representative of another may assert the rights of the other." Professor Davis states, after having said that,

> "Our problem is not that of authorized representation; the law is quite clear that Associated Industries may assert the rights of its members, consumers of coal [citing *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943), *dismissed as moot* 320 U.S. 707 (1943)], and that the National Coal Association may represent producers of coal, and such organizations as the United Mine Workers and the Railway Labor Executives Association may assert the rights of their members. [citing *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951)]." 3 DAVIS, ADMINISTRATIVE LAW TREATISE, §22.06, p. 227.

We submit that the principle which permits one suit by the National Motor Freight Traffic Association in a representative capacity rather than requiring 4,000 suits by its 4,000 adversely affected members, so long as "there is a common question of law or fact affecting the several rights and a common relief is sought," is

[3] System Federation No. 91 Ry. Emp. Dept. A.F. of L. v. Reed, 180 F. 2d 901 (6th Cir. 1950); also Rule 23 a)(3) of the Rules of Civil Procedure for the United States District Courts.

sound. Furthermore, in view of the decision of this Court in *N.A.A.C.P.* v. *Alabama*, *supra*, the principle is established law which the court below was not free to ignore.

The second ground supporting appellants' standing to maintain the action below is that they, in their individual capacities as separate entities, are aggrieved, adversely affected, and legally wronged by the challenged order of the Commission.

The court below wrongly found that appellant associations are not "subject to the regulatory provisions of the Interstate Commerce Act. Whatever novel competitive effects, if any, flow from the Commission's order, it will not affect the associations but only some of their individual members. . . ." (205 F. Supp. at 593).

The facts are, however, that both appellants are membership corporations which exist only by virtue of the provisions of section 5a of the Interstate Commerce Act (49 U.S.C. § 5b) and orders of the Commission issued thereunder approving the charters and by-laws of appellants. Pursuant to such approval, appellant association, through a standing committee thereof, the National Classification Committee, performs for its motor carrier members their duty under section 216(b) of the Interstate Commerce Act (49 U.S.C. § 316(b)) to establish just, reasonable, and otherwise lawful classifications of property for rate-making purposes and just and reasonable regulations and practices relating thereto. To this end it publishes and files with the Commission classifications of property and rules and regulations relating thereto, defends them in proceedings before the Commission, and initiates and par-

ticipates in proceedings respecting the lawfulness of the rates, classifications, rules, regulations, and practices of persons rendering transportation service in interstate commerce in competition with its members.

Pursuant to Commission approval, appellant Rocky Mountain Motor Tariff Bureau, Inc. performs for its members, some 120 motor common carriers of property in interstate commerce, their duty under section 216(b) of the Act to establish just, reasonable, and otherwise lawful rates for the transportation of property in interstate commerce, and just and reasonable regulations and practices relating thereto. To this end it publishes and files with the Commission rates and rules and regulations relating thereto, defends them in proceedings before the Commission, and initiates and participates in proceedings respecting the lawfulness of the rates, rules, regulations, and practices of persons rendering transportation service in interstate commerce in competition with its members.

Appellants may not change or establish new classifications or rates, or regulations or practices pertaining thereto, without first filing same with the Commission, and they are subject to Commission disapproval. Moreover, neither appellant may change its procedures by a change in its charter or by-laws without first obtaining Commission approval.

Appellants and other similar associations of carriers subject to comprehensive regulation by the Commission are absolutely essential to orderly and uniform regulation of a large and complex national transportation system. Without them, the hundreds of thousands of rates, ratings, and classifications of property which go to make up the national rate structure would reflect

the individual filings of the thousands of carriers operating throughout the nation, which would produce chaos where there is now relative order and consistency.

The point is, that associations such as appellants are parties vital to the regulatory scheme; the Congress has recognized as much in enacting section 5a of the Act, *supra;* and for these parties to carry the burden in adversary proceedings before the agency, only to be denied standing to question the lawfulness before the courts of the agency action which ensues, is indefensible either by legal logic or matters of policy, thus creating an anomaly in the law of judicial review and a glaring weakness in the regulatory scheme. The proposition that an association such as either appellant may carry the fight before the agency in its own name, but that it may not obtain judicial review of the lawfulness of the agency action when its members concededly are adversely affected thereby, is patently unrealistic and artificial, and, therefore, detracts from the symmetry of the law.

> "The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy. The second reason is that the artificiality and complexity of the law of standing would disappear if the courts would follow the simple idea that one who is in fact hurt may challenge; the large amount of litigation over the unnecessary complexities of the law of standing is wasteful. The third reason, applicable in the federal system, lies in the intent behind the Administrative Procedure Act." 3 DAVIS, ADMINISTRATIVE LAW TREATISE, § 22.02, p. 211.

Appellants here suffer a more direct, adverse effect than did the appellant in *CBS v. United States*, 316 U.S. 407, 422 (1942), where this Court said: "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant. . . . It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked."

A third ground upon which appellants' standing may properly be maintained is under the so-called *Sanders* doctrine, which takes its name from *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). There, a radio broadcasting station appealed the Federal Communications Commission's grant of a license to another party to construct a new station serving the same area. The claimed right of the appellant to sue depended upon whether it was "a person aggrieved or whose interests were adversely affected by the Commission's action, within the meaning of Section 402(b) of the Act, 47 U.S.C.A. § 402(b). . . ." (309 U.S. at 472-3). It should be noted that this statute's requirements for standing to sue are substantially identical to a portion of section 10(e) of the Administrative Procedure Act, *supra*.

This Court held that even though the suing party could not resist the grant of a license to another on the ground that the resulting competition would work economic injury to him, such party nevertheless had the requisite standing to bring suit challenging the

Commission's order and to raise any relevant question of law in respect of such order.

Professor Davis states that,

> "The Sanders doctrine as further developed in the Scripps-Howard and KOA [*Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *NBC (KOA)*, 319 U.S. 239 (1943)] cases is of primary importance to the law of standing, for the Supreme Court in the three cases has enumerated the principle that one whose only interest in attacking the administrative action is to avoid a new or increased competition has standing to make the attack, even though it is specifically recognized that the attacker has no 'legal right' at stake." 3 DAVIS, ADMINISTRATIVE LAW TREATISE, § 22.04, p. 221.

In the Scripps-Howard case, *supra*, this Court said that, "these private litigants have standing only as representatives of the public interest." (316 U.S. at 14).

Professor Jaffe states that, "Judge Frank in the well-known *Associated Industries* case [134 F. 2d 694 (2d Cir.) *vacated as moot*, 320 U.S. 707 (1943)] believed, correctly in my opinion, that under *Sanders* as reinforced by Scripps-Howard it is not a necessary element of the constitutional requirement of case or controversy that the plaintiff have any interest." *Jaffe, Standing to Secure Judicial Review: Private Actions*, 75 Harv. L.R. 255, 274 (1961).

It is submitted that by virtue of any one of the grounds discussed hereinbefore, appellants had standing to sue in the court below and that said court committed plain and substantial error in ruling to the contrary.

II. Lawfulness of Commission's Order

Appellants submit that the order of the Commission here challenged is clearly unlawful and presents a question so substantial as to require plenary consideration by this Court.

A. Contrary to Congressional Definition of Freight Forwarder

The function freight forwarders perform is the assembly of a number of less-than-carload (LCL) or less-than-truckload (LTL) shipments at a concentration station, the consolidation of them there into a single carload (CL) or truckload (TL) shipment for movement by rail or motor carrier to a break-bulk station, the deconsolidation there of the CL or TL shipment into the LCL or LTL shipments it contains, and the distribution from there of those LCL or LTL shipments. This service originated in World War I because of embargoes the rails placed against LCL shipments. *Motor Rail Co., Determination of Status*, 296 I.C.C. 205, 211 (1955). It continued thereafter primarily because it was better and faster than the service the railroads rendered in the movement of LCL shipments, and could be profitably rendered by the forwarders because they paid the railroads their lower carload rates and charged the shippers rates approximating the railroads' higher LCL rates.

This Court stated in *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344 (1940):

> "Forwarders utilize common carriers by rail and motor truck to transport goods owned by others. They solicit and obtain many small shipments, from various points within an area, and cause them to be carried in less than truckload or carload lots to a concentration center within the area. There they are assembled by the forwarder

for further transportation in truck-load or carload lots. Although the forwarder gives owners of individual small shipments his own contract corresponding in form to through bills of lading and assumes responsibility for safe through carriage, the forwarder customarily arranges for the pickup, assembly and transportation of the shipment by carriers for hire. And the forwarders, not the owners of the goods, select the carriers and route the shipments. Upon arrival of a truck-load or carload of the assembled small shipments at a distribution center, the bulk shipment is broken up, the forwarder separates and takes possession of the original small shipments and arranges, where necessary, their further carriage to their various final destinations in the area served by the particular distribution point. In this final carriage of the small shipment to its ultimate destination, the forwarder again utilizes carriers for hire to move these less than truck-load or carload lots. Thus, forwarders may use the service of carriers to assemble shipments of less than truck-load or carload lots at their concentration center, to transport the assembled truck-load or carloads to a distribution center and to carry the broken up small shipments beyond their break-bulk distribution center."

Freight forwarders were brought under regulation by the Interstate Commerce Commission by the enactment of Part IV of the Interstate Commerce Act in 1942 (49 U.S.C. 1001 et seq.). Under that Part no person may render service as a freight forwarder in interstate commerce without a permit from the Commission (Section 410), all service must be rendered at just, reasonable and otherwise lawful rates filed with the Commission (Sections 405, 406), no actual movement of shipments may be made by freight forwarders themselves except within their terminal areas, and only

common carriers may be employed to actually make any other movement (Section 418).

Section 402(a)(5) of the Interstate Commerce Act, defines a freight forwarder as one who holds himself out to transport or provide transportation of property *and* who, in the ordinary and usual course of his undertaking, assembles *and* consolidates or provides for the assembly *and* consolidation of shipments, *and* who breaks bulk *and* distributes or provides for the breaking of bulk *and* distribution of the so consolidated shipments. This definition is the key to this case, for the basic question is whether the service which the challenged Commission order permits is that of a freight forwarder within the meaning of Section 402(a)(5). If it is not, Western Freight Association (hereinafter, Western) has no authority to render it and consequently no legal right to publish and file rates covering it. As the Commission held in ordering rates proposed by a freight forwarder cancelled in *Class Rates, Official Territory To Corpus Christi*, 303 I.C.C. 293, 298 (1958):

> "In brief, the act provides, and it has been so found that the rates and charges of a freight forwarder shall not be established to cover 'the line-haul transportation between the principal concentration point and the principal break-bulk point.' Thus, a freight forwarder *must* assemble *and* consolidate *and* break bulk *and* distribute." (Emphasis supplied).

The quotation by the Commission in the portion of its decision above quoted is from its decision in *Radio and Television Sets, Illinois, Indiana, New Jersey, New York, and Rhode Island*, 302 I.C.C. 651, 656 (1958), reconsideration denied, May 29, 1958 in Investigation & Suspension Docket No. 6777. At issue in that case

were proposed rates of Lifschultz Fast Freight, a freight forwarder, covering the transportation of radio and television sets from New York and other points grouped therewith to Chicago and other points grouped therewith, and from the latter points to Providence, Rhode Island and other points grouped therewith. The service to be rendered at the rates included the delivery of shipments at destination but not the pickup of shipments at origin, it being contemplated that the shippers would tender the shipments in cars loaded by themselves. The Commission ordered the rates cancelled, saying:

> "The pertinent part of section 402(a)(5) defines a freight forwarder as any person which, in the ordinary and usual course of its undertaking, 'assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments. * * *.' Thus, a freight forwarder must assemble and consolidate 'and' break bulk and distribute. By Lifschultz' own statement, the instant shipments would be tendered in cars loaded by the shippers, and it is not established otherwise that the operation would be that of a freight forwarder. Thus, the proposed rates of Lifschultz are not shown to be lawful."

In short a freight forwarder must hold itself out to perform "in the ordinary and usual course of its undertaking" *all* of the functions described in Section 402 (a)(5) of the Act with respect to all of the shipments it handles. It may not hold itself out to render only *some* of those functions. The Commission specifically so held in *Motor Rail*, supra, 296 I.C.C. at 214. In that case a freight forwarder was "providing and holding

out to provide the transportation of volume or truckload shipments without performing consolidating or break-bulk operations in connection therewith." It argued that since it also held itself out to transport less-than-truckload shipments and to perform such service in connection therewith, it met the requirement of Section 402(a)(5) that it perform such service "in the ordinary and usual course of its undertaking." The Commission rejected the argument, saying:

> "We do not agree with Motor Rail's theory that a freight forwarder can provide some transportation of truckload shipments without assembling and distributing services in connection therewith. Such theory is contrary to the provisions and intent and purpose of the act and the determination thereunder by the Commission in the cases hereinbefore cited."

The meaning of the terms "assembly" and "distribution" as used in Section 402(a)(5) is clear. "Assembly service is the gathering less-than-truckload shipments of merchandise at consignors' place of business located at 'off-line' points (in pick-up or peddler trucks) and their transportation to the forwarder's concentration station . . . Distribution service is the transportation of less-than-truckload shipments from the forwarder's break-bulk point to the consignee's door." *Freight Forwarders, Motor Common Carriers, Agreements*, 272 I.C.C. 413, 419 (1948). The last quoted language also makes the meaning of the terms "consolidation" and "break-bulk" clear. The former is the making up of a number of LCL or LTL shipments in a single CL or TL shipment at a concentration station. The latter is the breaking down of a single CL or TL shipment into a number of LCL or LTL shipments at a break-bulk station.

Western, like most freight forwarders, maintains two sets of rates. One set, so-called "terminal to terminal" rates, applies on shipments moving from consignors' premises located within the terminal areas of the cities at which it maintains concentration stations to consignees' premises located within the terminal areas of the cities at which it maintains break-bulk stations. The other higher set applies on shipments moving from consignors' premises located beyond the terminal areas of the cities at which it maintains concentration stations to consignees' premises located beyond the terminal areas of the cities at which it maintains break-bulk stations. The actual movement in assembly and distribution service under the former rates can lawfully be performed by Western itself, either in its own vehicles or in those of an agent. The actual movement in assembly and distribution service under the latter rates can lawfully be performed only by common carriers, and is in fact usually performed by common carriers by motor.

Western's rates in issue take the form of reductions in its terminal to terminal rates applicable on shipments of minimum weights ranging from 20,000 to 30,000 pounds. The consideration for the reductions is the performance by the consignees of the shipments of part or all of Western's service in the breaking of bulk and distribution. For example, the tariff provides that if the consignee of a shipment of 30,000 pounds performs both break-bulk and distribution, i.e., "accepts delivery in the rail car and bears expense of unloading and delivery", Western's rate is reduced 80 cents per hundred pounds. If Western performs break-bulk and the consignee performs distribution, i.e., if Western "unloads and consignee accepts delivery at [West-

ern's] terminal dock" Western's rate is reduced 55 cents per hundred pounds. We submit that under the foregoing provisions of its tariff Western is plainly holding itself out to perform and performing only *some* of the functions described in Section 402(a)(5). This, it may not lawfully do.

Section 402(a)(5) obviously requires that the functions of assembly and consolidation and break-bulk and distribution be physically performed and the Commission has heretofore consistently so held. *Radio & Television Sets, supra; Kagarise Freight Forwarder Application*, 260 I.C.C. 745 (1946); *Colgate-Palmolive-Peet Co. v. Pacific & Atlantic*, 274 I.C.C. 797 (1949).

The court below remarked that "defendants [presumably, Western Freight Association] will continue to hold themselves out as freight forwarders within the terms of the Act under this reduced rate schedule *even though in a precise sense they may not break-bulk or distribute* . . . Plaintiffs seek in effect to deny consignees access to freight forwarder service altogether in those instances when a consignor prefers to make delivery and a consignee considers it prudent or profitable to undertake such unloading and delivery operations himself." (205 F. Supp. at 596, emphasis added.) The court below apparently believes that a person is a statutory freight forwarder if it merely *forwards* LCL or LCL shipments of others. If this is so, then the functions of assembling, consolidating, breaking bulk and distributing which are parts of the definition of "freight forwarder" in section 402(a)(5) mean nothing. Plaintiffs do not seek to deny consignees access to "freight forwarder services" in the circumstances referred to by the court below. *Assuming the service of Western will not, under such circumstances, be a*

freight forwarder service. It will be a service identical to that provided by appellants' member motor carriers.

The statement of the court below that it had not been "referred to cases which have so narrowly confined freight forwarders to actual physical unloading and delivery, as plaintiffs would have us do", is difficult to understand in view of the Commission decisions to that effect previously cited herein, all of which were cited in our briefs to the court below.

Western's tariff not only provides for the performance of both break-bulk and distribution by the consignee, but also provides for situations where shipments may move directly from consignor at origin to consignor "at his own expense, load and secure the much less handling, them. The tariff requires, except when loading is done at its terminals at New York, Philadelphia, Pittsburgh or Zanesville, Ohio, that the consignor "at his own expense, load and secure the freight in car furnished by [Western]." The railroads, under their tariffs, reserve the right to transport a single carload shipment of merchandise in two or three refrigerator cars in lieu of one boxcar. Western is, of course, a shipper *vis a vis* the railroads. Hence, for example, it may furnish a consignor located on a rail siding outside of its terminal at Philadelphia a refrigerator car within which to load a shipment of 30,000 pounds consigned to Los Angeles. The car would not then move in assembly service to Western's terminal for the consolidation of one or more other shipments therein. It would move directly to Western's terminal at Los Angeles, where the consignee could unload and deliver it.

Moreover, on some occasions boxcars are loaded by a consignor with a single less-than-carload shipment.

moved directly to Western's terminal at destination without being stopped to be completely loaded, and there unloaded and delivered by the consignee. Hence, the effect of the Commission's action is to authorize Western to limit both its holding out and its service to the public to the performance of line-haul transportation of precisely the same character as that performed by rail and motor carriers. Yet section 402 (a)(5) of the Act simply does not permit this. See *Chicago M. & St. P. & Pac. R. Co. v. Acme Fast Freight*, 336 U.S. 465, 472 (1949); *Colgate-Palmolive-Peet Co. v. Pacific & Atlantic, supra.* The court below excused such clear departure from the statutorily-defined function of a freight forwarder with the observation that "this practice, it is to be remembered, results from the operation of railroad and not freight forwarder rules . . . ." which thoroughly avoids the question of whether Western's service is that of a freight forwarder.

B. Contrary to the National Transportation Policy

This Court "has made it clear that [the National Transportation Policy], is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957). As that case shows, a primary end of the Policy is the recognition and preservation of the inherent advantages of each mode of transportation. As the Commission said in *Freight Forwarders, Motor Common Carriers, Agreements, supra*, 272 I.C.C. 413:

> "The primary function of forwarders is to provide for the consolidation of small shipments or reshipment thereof in larger quantities, usually in truckloads or carloads, in terminal-to-terminal movements, for distribution at the break-bulk

points. The assembly and distribution of such traffic is incidental to and in furtherance of the terminal-to-terminal movements. The primary reason for the forwarders development was their ability to obtain truckload or carload rates on small shipments which would ordinarily move at less-than-truckload or less-than-carload rates much higher than the carload or truckload rates. It appears that, by this method of handling, more efficient and faster service frequently results than would be generally provided on less-than-truckload or less-than-carload traffic which was not similarly consolidated. *This method of handling terminal-to-terminal movements represents the inherent advantage of forwarder service, and is, perhaps the main reason for recognizing the forwarders as performing a useful service in the transportation field* and subjecting them to regulation under part IV of the act." (Emphasis supplied).

What the Commission and the court below have done in this case is to authorize Western, and therefore presumably other freight forwarders, to handle shipments in the same way that the rail and motor carriers handle them. This method is one of the inherent advantages of the latter, but not one of the inherent advantages of the former. Thus, to allow freight forwarders to use this method is to allow them to exploit one of the inherent advantages of another mode of transportation. This can only result in a diversion of traffic from the motor carriers, the curtailment of their revenues, the undermining of their financial position and the impairment of their ability to discharge their statutory duty to render adequate and efficient service to the public.

As Commissioner Walrath said in his dissent in *Forwarder Volume Commodity Rates, Chicago and New*

York, 310 I.C.C. 199 (1959), on the basis of which he dissented in this case:

> "There can be little doubt that approval of [the] proposals here will permit a new and previously unauthorized method of competition for motor carriers without the safeguards of requiring proof of public convenience and necessity. The effect may be likened to the Commission suddenly granting certificates to additional carriers from volume shipper origins to the principal city (railhead) destinations of the nation. I find it difficult to believe this was contemplated or authorized by the Congress in promulgating Part IV of the act, or by the Commission in its case-by-case determination cited in this report."

CONCLUSION

The questions presented by this appeal are substantial and are of sufficient public importance to require plenary consideration, with briefs and oral argument, for their resolution by this Court.

Respectfully submitted,

BRYCE REA, JR.
FREDERICK A. BABSON, JR.
1329 E Street, N. W.
Washington 4, D. C.
Attorneys for Appellants

October 2, 1962

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1694-60

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

Opinion

Bryce Rea, Jr., of Washington, D. C., for plaintiffs.

Joel Hoffman, Attorney, Department of Justice, for the defendant United States of America.

Fritz R. Kahn, Attorney, Interstate Commerce Commission, for the defendant Interstate Commerce Commission.

James L. Givan, of Washington, D. C., for the intervenors.

Before BURGER, Circuit Judge, and MATTHEWS and WALSH, District Judges.

BURGER, Circuit Judge.

Plaintiffs seek to set aside and annul a decision of the Interstate Commerce Commission[1] approving a tariff published by the Western Freight Association, a freight forwarder, in which reduced rates were set out for freight shipments of 20,000-30,000 pounds moving from the area called Official Territory (generally the territory East of the Mississippi River and North of the Ohio and Potomac

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[1] Investigation and Suspension Docket No. 6993 (Eighth Supplemental Order), Forwarder Volume Commodity Rates, Transcontinental, reported at 306 I.C.C. 535 and upon reconsideration at 311 I.C.C. 773.

Rivers) to points on the Pacific Coast. Plaintiffs, all motor carrier associations whose members are individual carriers engaged in interstate commerce, attack the tariff as unlawful insofar as under its terms freight forwarders need not perform certain specific freight forwarding duties which the plaintiffs urge are required by § 402(a) of the Interstate Commerce Act, 56 Stat. 284 (1942), 49 U.S.C. § 1002(a)(5) (1958). It is argued that the freight forwarders under this tariff thus illegally enter into destructive competition with the motor carrier industry contrary to established national transportation policy. The Western Freight Association and nine other freight forwarders with similar vital interests have intervened.

The Government vigorously argues that the plaintiffs lack standing to sue as they are simply associations of carriers rather than carriers and hence will not be affected by the challenged order of the Commission. Plaintiffs point out that they are incorporated organizations engaged in many official services for the individual carriers comprising their membership, including, *inter alia*, frequent appearances before the Interstate Commerce Commission on behalf of members.

However, the claims made by plaintiffs regarding the multiple services they undertake for members are not relevant to the question of standing to sue in this court. Nor is standing in a judicial proceeding to be equated with participation in a proceeding in the Interstate Commerce Commission. An association's access to administrative agency proceedings rests on a different basis from standing to sue in this court. *See Pittsburgh & W. Va. Ry. Co. v. United States*, 281 U.S. 479 (1930). The essence of any litigant's qualification to sue is his susceptibility to injury

[2] Acme Fast Freight, Inc., International Forwarding Company, Inc., Merchants Shippers Association, National Carloading Corporation, Pacific Forwarding Association, Inc., Republic Carloading & Distributing Co., Inc., Universal Carloading & Distributing Co., Inc., Western Carloading Co., Inc. and Westland Forwarding Co.

in a legally cognizable sense, which, stated another way, is simply the reality of his being aggrieved by the decree or party he challenges. The law provides no remedies for imagined detriment. In this light, the fact stands out that the plaintiff associations will in no way be affected by the freight forwarder rates fixed by the challenged Commission order except in the remote sense that the problems of their members are their concern. The associations are not engaged in the business of motor transportation, nor subject to the regulatory provisions of the Interstate Commerce Act. Whatever novel competitive effects, if any, may flow from the Commission's order, it will not affect the associations but only some of their individual members; consequently it cannot be said that the associations face any but a vicarious economic threat and that only in the narrow sense that adverse economic effects on members may ultimately but indirectly cause a diminution of support or contributions for the associations. Even this remote contingency is speculative. This would be an attenuated form of general economic injury for which courts have been reluctant to give relief especially when it results from normal non-discriminatory competitive patterns. See *Hines, Trustee v. United States*, 263 U.S. 142 (1923); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249 (1930).

We do not find *Associated Industries v. Ickes*, 134 F. 2d 694 (2d Cir. 1943), *dismissed as moot*, 320 U.S. 707, persuasive or applicable authority to the contrary. There the Bituminous Coal Act of 1937 accorded standing to "persons aggrieved," a category of litigant which under broad Supreme Court interpretations[3] included *anyone* threatened with economic adversity. A "person aggrieved," as the *Ickes* case pointed out, "need not show that he has such 'standing' as is *ordinarily* required in injunction suits to restrain actions by officials alleged to be unlawful . . . ." 134 F. 2d at 702. (Emphasis added.) The present plain-

[3] See F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4 (1942).

tiffs have brought an injunction suit against the United States, and the requirements of standing which "ordinarily apply" are the requirements to be met. See *Utah Citizens Rate Ass'n* v. *United States*, 192 F. Supp. 12 (1960). Neither *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (1961), *aff'd*, 369 U.S. 37 (1962), nor *American Trucking Ass'ns* v. *United States*, 364 U.S. 1 (1960), bar this conclusion, since in both cases the plaintiffs were comprised of individual carriers as well as membership associations, and where one party thus has standing to sue, as did the individual carriers there, it is immaterial under the liberal intervention statute, 28 U.S.C. § 2323, that the remaining association plaintiffs might not have had standing to originally bring suit. See *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (D.C. Ala. 1959), *aff'd.*, 361 U.S. 353 (1960).

Assuming, arguendo, we are in error on the issue of standing,[1] the importance of the case suggests the desirability of considering the merits so that the parties will have our views on the substantive as well as the jurisdictional issue, for whatever that may be worth.

Section 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. 1002(a)(5) describes a freight forwarder as

> any person . . . (other than a motor, rail or water carrier subject to Part I, II or III of the Act) which holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations

[1] For excellent contrasting studies which depict the complexity of problems of standing, see Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255 (1961) and Davis, *Standing to Challenge Governmental Action*, 39 Miss. L. Rev. 353, 369 (1975).

with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for . . . . transportation of such shipments, the services of a (motor, rail or water) carrier subject to part I, II, or III of this Act.

In essence, the freight forwarder is the intermediary between shippers with a typically small consignment (300-400 pounds) and the carriers who transship the goods by rail, motor or water to the consignee. Ordinarily a single shipper cannot assemble a shipment sizeable enough to fully load a boxcar or truck, and must thus pay higher less-than-car or truckload rates for carriage. The freight forwarder, however, by consolidating consignments of different goods from multiple shippers at a single terminal is enabled to fill entire trucks or boxcars, usually with up to 60,000 -pound capacities, and thereby obtains commensurately lower rates from the carrier, thus effecting a substantial saving from which he is paid. The individual shipper will conventionally pay the freight forwarder nearly the same rate he would pay the common carrier, but through the freight forwarder's handling is afforded the added benefits of expedited service (1) because of the forwarder's freedom to specify the routing of consolidated shipments and (2) because of the absence of delays while economically transportable quantities accumulate with the carrier. The forwarder's profit stems from the difference between the amount it is charged for the mass shipment by the carrier and the amount it charges the individual shippers whose several consignments comprise the consolidated load. *See Chicago, Milwaukee, St. Paul & Pac. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 484 (1949).

As plaintiffs urge, it is quite true that the forwarders usually and in the ordinary course of their undertaking perform or provide for the performance of certain reasonably distinct functions: a forwarder ordinarily (1) *assembles* the several different shipments at its terminal by having them brought in from the various consignor premises, usally by motor carrier; (2) it *con-*

solidates the shipments into a proportion qualifying for the reduced carrier rate and in this form sees to their safe transport to destination; (3) it *"breaks bulk"* at the destination point by restoring each shipper's merchandise in units for delivery to the consignee; and (4) *distributes* the separated shipments or arranges for their distribution, again usually by motor carrier, to the premises of the various consignees not located in the destination terminal.

The challenged tariff contemplates certain variations from these ordinary procedures when a shipper desires transportation for 20,000-30,000 pound loads, and it offers the shipper a reduced charge contingent upon what degree of variation occurs. Thus where a shipper delivers his own freight to the forwarder's loading facility or where he arranges to have the consignee pick up the freight at the carrier's destination terminal, or both, the freight charge will be correspondingly lower. The reduced rate, as suggested, flows from performing less service.

These variations by which consignors or consignees engage in certain operations normally administered by motor carriers under contract with the freight forwarder constitute the gravamen of the motor carrier's complaint. Complaint is additionally lodged against the practice by which consignor-shippers of 20,000-30,000 pounds under this tariff will receive an empty boxcar on a siding on their own premises and load it without the freight forwarder's assistance. Under current rules promulgated by the railroads for their own convenience, specifically the "marriage" rule and the "three for one" rule,[5] such

[5] The Commission below described these rules as follows:

> To facilitate the return of refrigerator cars to the west coast and with payloads, the transcontinental rail lines publish rules reserving the right to tender two or three such cars in lieu of an ordered boxcar, depending upon the size of the latter. They also publish so-called "marriage" rules under which, instead of stopping in transit a partially loaded car

a car may conceivably never pass through a consolidation or de-consolidation process at a freight forwarder terminal point, either of origin or destination, but will be directly delivered in its partially loaded form to the consignee's siding, in which case the freight forwarder will have never handled or seen the shipment, and consequently will not have performed, in the literal sense, all the steps outlined for freight forwarding operations by § 402 (a) (5). The forwarder's service in such case is limited to making shipping arrangements such as selection of carrier, routing, etc.

The plaintiff Associations' objections to these operations cannot be upheld. With regard to instances where a consignor partially loads a boxcar himself and direct shipment thereafter prevents normal consolidation operations by the freight forwarder, who has no contact with the car whatever, we find nothing in the act which commands otherwise, nor do we observe that the national transportation is contravened by the practice. This practice, it is to be remembered, results from the operation of railroad and not freight forwarder rules, and moreover will be the exceptional and not the usual procedure. Normally such a car, partially loaded with the 20,000-30,000 pounds to

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for completed loading, they may tender another car, the billing nevertheless showing the handling originally desired by the party tendering the traffic and thus "marrying" the two cars with partial loads.

In either case, then, the shipment is fictionally viewed as having been made by only one fully loaded car, and the rate charged reflects this.

Distinguishable in this respect are the Commission decisions in *Class Rates, Official Territory to Corpus Christi*, 303 I.C.C. 293 (1958) and *Radio & Television Sets*, 302 I.C.C. 654 (1958), relied upon by plaintiff, in which the rates in issue did not require the freight forwarder to perform in the ordinary course of business both assembly and consolidation, as well as breakbulk and distribution.

which the challenged rate is applicable, will roll to a freight forwarder concentration point for consolidation with other shipments "to approximate as nearly as practicable the average of 60,000 pounds which the respondent's experience indicates can be loaded in one car of mixed shipments." 311 I.C.C. 775. Indeed, profit for the freight forwarder lies precisely in the utility of such consolidation. Thus *only* when *convenience for the railroads* requires that the "marriage" or "three for one" rules be invoked, whereby constructive consolidation occurs, can the freight forwarder *not* proceed with actual consolidation and still hope for a profit. It is clear that the occasional departure from this norm of actual consolidation and distribution is not so seriously nor so frequently at variance with the literal language of the Act as to outweigh the benefit to the shipping public which the operation of the 20,000–30,000 pound tariff viewed as a whole will afford.

Secondly, in our view defendants will continue to hold themselves out as freight forwarders within the terms of the Act under this reduced rate schedule even though in a precise sense they may not break bulk or distribute to beyond destination terminal points if the consignees desire to do their own unloading and delivery as the schedule permits. Plaintiffs seek in effect to deny consignees access to freight forwarder service altogether in those instances when a consignor prefers to make delivery and a consignee considers it prudent or profitable to undertake such unloading and delivery operations himself. This might well be the case where particularly fragile or delicate goods are involved, or when the consignor or consignee considers himself otherwise better equipped to carry on those particular jobs. At the same time plaintiffs do not suggest that there is a method alternative to freight forwarding whereby large less-than-carload shippers can obtain the same advantages for ordinary interstate carriers. Nor are we referred to cases which have so

narrowly confined freight forwarders to actual physical unloading and delivery, as plaintiffs would have us do.[2]

No reason appears to require a view that the break-bulk and distribution operations are always distinct, always occur in a certain order, and may never be consummated coincidentally or concurrently. We think it within the purview of statutory policy to consider that the freight forwarder has appropriately performed whatever his break-bulk and distribution functions may be when he has made a shipment available to a consignee at the destination terminal and, at consignee's option and request, relinquished control over the shipment to the consignee to do with it as the latter sees fit under the contract.

That aspect of the national transportation policy which seeks to promote more efficient service is clearly well served by the operations which may be undertaken under the freight forwarder rate schedule which the Commission has here approved. As the Commission said, "If a forwarder can handle a heavier weighted shipment more economically than it can handle several small shipments of the same aggregate weight, the shipping public should receive the benefits flowing from that fact." 311 I.C.C. 775. On the other hand, no destructive competitive effects appear of a proportion to offset the benefits of this improvement.

The essence of plaintiffs' case is that a forwarder *must* actually perform all the functions he is *authorized* to perform, *i.e.*, (1) assemble, (2) consolidate, (3) break bulk and (4) distribute the consignor's freight. Failing to do *all four* steps, plaintiffs claim, one cannot hold out as a forwarder. The forwarders proffer these services but

[2] Cf. Dixon Coal Co. v. International Forwarding Co., 301 I.C.C. 1, 3 (1958), where the Commission did *not* think that "to retain its freight forwarder status under the act a forwarder must assemble and consolidate, and break bulk and distribute as to every shipment handled by it. To so hold would disregard the [] provision in section 402 a[] in the ordinary and usual course of its undertaking."

that is the extent of their obligation under the certificate. If some consignors or consignees wish to have less than the proffered service no statute and no public policy prevent such arrangements being authorized by the Commission. The order of the Commission should not be disturbed, and the complaint is therefore dismissed.

WARREN E. BURGER
United States Circuit Judge.

BURNITA SHELTON MATTHEWS,
United States District Judge.

LEONARD P. WALSH
United States District Judge.

APPENDIX B

INTERSTATE COMMERCE COMMISSION.

INVESTIGATION AND SUSPENSION DOCKET NO. 6993[1]

(Eighth Supplemental Order)

FORWARDER VOLUME COMMODITY RATES—TRANSCONTINENTAL

Decided May 18, 1959.

Proposed reduced freight-forwarder volume rates on heavy single shipments from origins in official territory to destinations on the Pacific coast and in intermountain territory, found just and reasonable. Proceeding discontinued.

Charles O. Jonas for respondent.

[1] The issues in this proceeding are not related to those in original I & S No. 6993 or the first 7 supplemental orders therein, which will be disposed of in a separate report.

W. C. Mitchell, Paul J. Coughlin, George H. Leonard, Harry C. Ames, James L. Girau, and *S. S. Eisen* for interveners in support of respondent.

LeGrand A. Carlston, Z. L. Pearson, Jr., Edgar Watkins, and *Roland Rice* for protestants.

J. E. Haydon for intervener supporting protestants.

Report of the Commission

DIVISION 3, COMMISSIONERS FREAS, WALRATH, and MCPHERSON.

By DIVISION 3:

Due and timely execution of our functions under section 406(c) of the Interstate Commerce Act imperatively requires that no proposed report be issued in this proceeding. Requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on October 26, 1958, Carl E. Anderson, Robert C. Anderson, Grace E. Anderson, and Arthur E. Anderson, doing business as Western Freight Association, a freight forwarder called the respondent or WFA, proposed to establish a rule providing for reduced rates on heavy single shipments, ranging in minimum weights from 20,000 to 30,000 pounds, from origins in official territory to destinations on the Pacific coast and in intermountain territory. Upon protest of the National Motor Freight Traffic Association, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Rocky Mountain Tariff Bureau, Inc., the operation of the proposed schedules was suspended to and including May 21, 1959.

The respondent's rates are of two kinds: Terminal-to-terminal transcontinental rates, which apply from assembly to distribution points, and so-called arbitraries, which apply from outlying origins to assembly stations and

from distribution stations to outlying destinations. The respondent states that the contemplated reductions[2] would be made only in the terminal-to-terminal rates, so that the arbitraries would not be affected. The reductions as proposed in the terminal-to-terminal rates are as follows:

Minimum weight (pounds)	Note A (cents)	Note B (cents)	Note C (cents)
20,000	55	30	5
22,000	60	35	10
24,000	65	40	15
26,000	70	45	20
28,000	75	50	25
30,000	80	55	30

Note A—Applies when consignees accepts delivery in rail car and bears expense of unloading.

Note B—Applies when WFA unloads and consignee accepts delivery at WFA terminal dock.

Note C—Applies when WFA unloads and makes store-door delivery.

As noted in the above table, the proposed reductions are graduated. When the respondent, for example, unloads the rail car and delivers 28,000 pounds of freight by motor carrier (Note C), it proposes a reduction of 25 cents in the rate; when the respondent unloads and the consignee accepts delivery at the respondent's terminal dock (Note B), an additional reduction of 25 cents is proposed; and another 25-cent reduction would be made when the consignee accepts delivery in the rail car and bears the expense of unloading (Note A). The proposed reductions

[2] Reductions, rates, arbitraries, and costs, unless otherwise provided, are stated per 100 pounds.

range from a low of 5 cents on a single shipment of 20,000 pounds when the respondent unloads the car and makes delivery by motor carrier, to a high of 80 cents on shipments of 30,000 pounds when the consignee takes delivery in the rail car and bears the expense of unloading.

The respondent's present rates from its assembly points, such as Pittsburgh, Pa., to its points of distribution, such as Los Angeles, Calif., generally are about $1.42 higher than the rail carload rates, and when the latter are subject to varying minimum weights the respondent's rates are predicated on the one subject to the highest minimum not exceeding 60,000 pounds. On this basis, the respondent's net revenue on a terminal-to-terminal movement of shipments weighing from 20,000 to 30,000 pounds ranges from $284 to $426 per shipment. Under the proposed rule, the respondent's rates on similar shipments would be reduced by amounts ranging from 5 cents to 80 cents, depending on the weight of the shipments and the method of delivery, thereby reducing its net revenues by amounts ranging from $10 to $240. In addition, the respondent now maintains rates on certain commodities which vary with the weight of the shipments. For example, on clay or earthenware floor tile from Pittsburgh to Los Angeles the rates range from $3.50 on 20,000 pounds to $3.02 on 30,000 pounds for store-door delivery. It is proposed to cancel these rates and make the less-than-carload rate of $3.61 thereon subject to the proposed rule.

The profits of the respondent are determined after deducting the costs for loading, unloading, delivery, billing, and incidental direct expenses said to be trivial, together with the general expenses. The costs for loading, unloading, and delivery are shown to average 25 cents each, a total of 75 cents, and the cost of billing appears as about 54 cents per shipment. The respondent's shipments in 1958 averaged approximately 380 pounds each. It would require 53 such shipments to total 20,000 pounds and 79

to total 30,000 pounds. Using 54 cents as the cost of billing each shipment, which figure is based in part on certain data considered in *Surcharge on Small Shipments within Central States*, 63 M.C.C. 157, the respondent indicates savings in costs of $28.08 in billing a single shipment of 20,000 pounds in lieu of billing 53 shipments totaling that amount, and savings of $42.12 in billing a single shipment of 30,000 pounds in lieu of billing 79 shipments totaling that amount. In addition, the respondent considers the movement of shipments from 20,000 to 30,000 pounds as attractive in that it permits the loading of heavier cars with greater ease. It states that it would not handle a single shipment of these amounts without loading other traffic in the same car, or in another car if the shipment originated at a point beyond its assembly point in a rail car and the rail carriers substituted, at their convenience, another car to complete loading at the assembly point.

Arbitraries are added to the respondent's terminal-to-terminal rates on shipments transported by motor carrier from origins beyond the assembly points or to destinations beyond the distribution points. These arbitraries generally are 1 cent higher than the contract rates paid by the respondent to the motor carriers, and are said to have been established in purported compliance with the decision in *Acme Fast Freight, Inc.* v. *Western Freight Assn.*, 299 I.C.C. 315. The respondent's rate on electrical appliances from Pittsburgh to Los Angeles, for example, is $4.14, and this rate, under the proposed rule, would be reduced by 30 cents on a 30,000-pound shipment unloaded and delivered by the respondent. A similar reduction would be made if a like shipment were destined to Belvedere, Calif., but an arbitrary of 31 cents would be added for the movement from Los Angeles to Belvedere. If the consignee at Belvedere elected to take delivery of the shipment at the respondent's terminal in Los Angeles, an additional reduction of 25 cents would be made, but the arbitrary

would not apply. The record shows no instance where the arbitrary would not be more than 25 cents.

As indicated, the respondent's net revenue on terminal-to-terminal shipments weighing from 20,000 to 30,000 pounds ranges from about $284 to $426 per shipment. After deducting from $10 to $240 per shipment under the proposed rule, the respondent would still retain amounts ranging from $274 to $186; and it would be relieved of the cost of either unloading, or unloading and store-door delivery, which, according to the record, would range from about $50 to $150 per shipment. After considering the cost of loading at 25 cents, the respondent would retain amounts ranging from about $224 to $111 per shipment. It thus appears that the rates as proposed would yield substantially more than full cost plus a reasonable profit. On this record, we can not find that the suspended schedules constitute a destructive competitive practice.

We find that the schedules under consideration herein are just and reasonable. An order will be entered discontinuing the proceeding.

Order

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 18th day of May, A.D. 1959.

Investigation and Suspension Docket No. 6993

(Eighth Supplemental Order)

Forwarder Volume Commodity Rates—Transcontinental

It appearing, That by order dated October 22, 1958, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules to and including May 21, 1959;

It further appearing, That a full investigation of the matters and things involved in this proceeding has been made, and that said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 3.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 24th day of September, A.D., 1959.

INVESTIGATION AND SUSPENSION DOCKET No. 6993

(Eighth Supplemental Order)

FORWARDER VOLUME COMMODITY RATES—TRANSCONTINENTAL

Upon consideration of the record in the above-entitled proceeding, petition of protestants and supporting intervener filed June 23, 1959, for reconsideration of the report of Division 3, decided May 18, 1959, and respondent's reply thereto filed July 9, 1959;

It is ordered, That the said petition be, and it is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission, Division 3, are fully supported by the evidence, and the matters submitted in support of the petition do not present substantial and material grounds to warrant reopening the proceeding for reconsideration.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23d day of June, 1960.

Investigation and Suspension Docket No. 6283

(Eighth Supplemental Order)

Forwarder Volume Commodity Rates—Transcontinental

Upon further consideration of the record in the above-entitled proceeding, including the petition of protestants and supporting intervenor filed June 23, 1959, for reconsideration of the report and order of Division 3, dated May 18, 1959, and respondent's reply thereto filed July 9, 1959, and it appearing that the report and orders do not adequately dispose of all relevant issues;

It is ordered, That this proceeding be, and it is hereby, reopened for reconsideration upon the existing record, and;

It is further ordered, That the order dated May 18, 1959 by Division 3 and the order of September 24, 1959 by the Commission be; and they are hereby, vacated.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 6993[1]

(Eighth Supplemental Order)

FORWARDER VOLUME COMMODITY RATES—TRANSCONTINENTAL

Decided December 19, 1960.

Upon reconsideration, freight-forwarder volume rates on heavy single shipments from origins in official territory to destinations on the Pacific coast and in inter-mountain territory found just and reasonable, and otherwise lawful. Findings in prior report, 306 I.C.C. 535, affirmed, and proceeding discontinued.

Appearances as shown in the prior report.

Report of the Commission on Reconsideration

BY THE COMMISSION:

In the prior report herein, 306 I.C.C. 535, decided May 18, 1959, Division 3 found just and reasonable proposed reduced freight-forwarder volume rates, and discontinued the proceeding. Upon our own motion, the proceeding was reopened for reconsideration on the present record. The facts are set forth in the report of the division and will be stated here only to the extent necessary for an understanding of the issues herein discussed.

This proceeding concerns a rule providing for reduced rates on heavy single shipments, minima 20,000 to 30,000 pounds, established by Western Freight Association, a freight forwarder called the respondent or WFA. The

[1] The rates in this proceeding are not related to those involved in the original I. & S. No. 6993 or the first 7 supplemental orders therein, which were disposed of in a separate report.

reductions apply on shipments moving from origins in official territory to destinations on the Pacific coast and in intermountain territory. The schedules providing the reductions were suspended until May 22, 1959, when they became effective.

The respondent's rates are of two kinds: terminal-to-terminal transcontinental rates, which apply from assembly to distribution points, and so-called arbitraries, which apply from outlying origins to assembly stations and from distribution stations to outlying destinations. The reductions[2] were made only in the terminal-to-terminal rates. The reductions were as follows:

Minimum weight (pounds)	Note A (cents)	Note B (cents)	Note C (cents)
20,000	55	30	5
22,000	60	35	10
24,000	65	40	15
26,000	70	45	20
28,000	75	50	25
30,000	80	55	30

Note A—Applies when consignee accepts delivery in rail car and bears expense of unloading and delivery.

Note B—Applies when WFA unloads and consignee accepts delivery at WFA terminal dock.

Note C—Applies when WFA unloads and makes store-door delivery.

The respondent's prior rates from its assembly points, such as Pittsburgh, Pa., to its distribution points, such as Los Angeles, Calif., generally were about $1.42 higher than the rail carload rates, and when the rail rates were

[2] Reductions, rates, arbitraries, and costs, unless otherwise provided, are stated per 100 pounds.

subject to varying minimum weights the respondent's rates were predicated on the one subject to the highest minimum weight not exceeding 60,000 pounds. On that basis, the respondent's net revenue on a terminal-to-terminal movement of shipments weighing from 20,000 to 30,000 pounds ranged from $284 to $426 per shipment. Under the new rule, the respondent's rates on similar shipments are reduced by amounts ranging from 5 cents to 80 cents, depending on the weight of the shipments and the method of delivery, thereby reducing its net revenues by amounts ranging from $10 to $240. The new schedules also canceled rates on certain commodities which varied with the weight of the shipments. For example, on clay or earthenware floor tile from Pittsburgh to Los Angeles the rates ranged from $3.50 on 20,000 pounds to $3.02 on 30,000 pounds for store-door delivery. These rates were canceled and the less-than-carload rate of $3.61 thereon was made subject to the new rule.

The respondent's profits are determined by deducting the costs for loading, unloading, delivery, billing, and incidental direct expenses, together with the general expenses. The costs and revenues are fully explained in the prior report and need not be repeated here.

It is contended by the protestants that freight forwarders rates on shipments of 20,000 to 30,000 pounds constitute a holding out of other than freight forwarder service, and therefore are unlawful. In our report on reconsideration in I. & S. No. 6993,[3] *Forwarder Volume Commodity Rates, Chicago and New York*, 310 I.C.C. 199, decided April 8, 1960, a similar contention was discussed. In that proceeding, proposals were made by certain freight forwarders to establish volume commodity rates, subject to minima ranging from 10,000 to 30,000 pounds, between Chicago, Ill., and New York, N. Y. The protestant therein con-

[3] Including supplemental orders Nos. 1, 2, 3, 4, 5, 6, and 7 in I. & S. No. 6993, and embracing also No. 32530, Forwarder Volume Commodity Rates Between Chicago and New York.

tended that freight forwarders should not be permitted to establish rates designed to attract volume shipments because that would be outside their normal sphere of assembling and consolidating small shipments, and would give rise to destructive competition contrary to the national transportation policy. We pointed out therein that there is nothing in the provisions of part IV of the Interstate Commerce Act or the legislative history of that part which establishes that freight forwarders are, or were intended to be, limited in the weight of shipments which they may handle, or which prohibits the establishment by them of rates subject to minima ranging from 40,000 to 30,000 pounds. As we stated therein, if a forwarder can handle a heavier weighted shipment more economically than it can handle several small shipments of the same aggregate weight, the shipping public should receive the benefits flowing from that fact. We are of the same views here.

The protestants urge that in certain other respects the operations conducted by the respondent under the resulting rates are not those of a freight forwarder. The argument runs thus: A 30,000-pound shipment of acid can be loaded by a consignor into a car at a point more distant than a terminal of the respondent and the car can move through to destination and there be unloaded by the consignee without once being seen by the respondent; there is thus no actual physical assembling or consolidation and no break bulk or distribution, services which a freight forwarder performs "in the ordinary and usual course of its undertaking" and which are set forth as part of the definition of freight forwarders in section 402(a)(5) of the act.

The transportation described by the protestants can occur physically for the following reasons: To facilitate the return of refrigerator cars to the west coast, and with pay loads, the transcontinental rail lines publish rules reserving the right to tender two or three such cars in lieu of an ordered box car, depending upon the size of

the latter. They also publish so-called "marriage" rules under which, instead of stopping in transit a partially-loaded car for completed loading, they may tender another car, the billing nevertheless showing the handling originally desired by the party tendering the traffic and thus "marrying" the two cars with the partial loads. Published charges are made for stopping to partially load and unload.

Normally, a partially-loaded car would move to the respondent's terminal for the loading of additional shipments to approximate as nearly as practicable the average of 40,000 pounds which the respondent's experience indicates can be loaded in one car of mixed shipments. There is then no question that consolidation is practiced. The fact that rules of the carriers performing the underlying transportation (which are not here in issue but which are for their convenience) at times obviate the handling that otherwise would be performed, does not render the respondent's operations unlawful. We regard these operations as those of a freight forwarder as defined in the act. Then there is no merit in the protestant's argument.

As stated in the prior report, the considered rates appear to yield substantially more than full cost plus a reasonable profit, and there is no basis on this record for finding that they constitute a destructive competitive practice.

Upon reconsideration, the findings of Division 3 in the prior report are affirmed. We further find that the considered rates are not otherwise unlawful. An appropriate order will be entered discontinuing the proceeding.

COMMISSIONER MURPHY, dissenting:

In my opinion the respondents can not be relieved from their duty of performing freight forwarder service as outlined by definition in section 402(a)(5) of the act. The practices of the carriers performing the underlying transportation provides no basis for disregarding the statutory provisions set forth which clearly describe the

duties of a freight forwarder in the performance of its service.

COMMISSIONER WALRATH, dissenting:

For the reasons indicated in my dissenting expression in I&S No. 6993 (310 I.C.C. 199), cited by the majority, I am of the opinion that the publication of volume rates is beyond the scope of legitimate forwarder activity.

COMMISSIONERS TUGGLE and HERRING did not participate.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of December, A.D. 1960.

INVESTIGATION AND SUSPENSION DOCKET NO. 6993

(Eighth Supplemental Order)

FORWARDER VOLUME COMMODITY RATES—TRANSCONTINENTAL

It appearing, That on May 18, 1959, Division 3 entered its report and order herein, 306 I.C.C. 535, and that by order dated June 23, 1960, the proceeding was reopened for reconsideration upon the existing record;

It further appearing, That we have this day made and filed a report on reconsideration herein containing our findings of fact and conclusions thereon, which report and the prior report of Division 3 are hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Office Supreme Court, U.S.
FILED
OCT 29 1962
JOHN F. DAVIS, CLERK

No. 479

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. and ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,

Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE FREIGHT FORWARDERS TO AFFIRM

D. ROBERT THOMAS
HARRY C. AMES, SR.
GILES MORROW
S. SIDNEY EISEN
JAMES L. GIVAN

Attorneys for Appellee Freight Forwarders

SIDLEY, AUSTIN, BURGESS & SMITH
11 South La Salle Street
Chicago 3, Illinois

Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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Appellants

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees

On Appeal from the United States District Court for the District of Columbia

MOTION OF APPELLEE FREIGHT FORWARDERS TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the appellee freight forwarders (including the forwarder whose reduction in rates has been approved herein by the Interstate Commerce Commission and by the District Court) move that the unanimous judgment of the three-judge District Court sought to be reviewed in this case be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

In the proceeding before the Interstate Commerce Commission, the freight forwarder whose tariffs are directly involved (Western Freight Association) was the respondent. The other appellee forwarders* intervened in support

*Acme Fast Freight, Inc., International Forwarding Company, Inc., Merchants Shippers Association, National Carloading Corporation, Pacific Forwarding Association, Inc., Republic Carloading & Distributing Co., Inc. Universal Carloading & Distributing Co. Inc., Western Carloading Co., Inc. and Westland Forwarding Co.

of the respondent and all intervened in the District Court proceeding, in defense of the Commission's decision.

The opinion of the District Court is reproduced in the Appendix to the Jurisdictional Statement (herein called "J.S.") at pages 1a to 10a. The Report of the Commission and its Report on Reconsideration are reproduced in that Appendix at pages 10a to 15a and 19a to 24a.

STATEMENT IN SUPPORT OF MOTION

By tariff Schedules filed with the Commission in 1958, Western Freight Association (WFA), a freight forwarder under Part IV of the Interstate Commerce Act (49 U.S.C. Sec. 1000 *et seq.*), reduced its freight rates on certain westbound transcontinental shipments. The reductions, after approval by the Commission, became effective in May of 1959 (J. S. Appendix, p. 20a). The appellants seek to compel WFA to cancel its tariffs for the rate reductions.

The reductions were not opposed by any railroads, forwarders, shippers or consignees, and no motor carriers appeared either in the Commission or the District Court. Three non-profit membership corporations, two of which are the appellants, protested the reductions. Members of those corporations are motor carriers, including some who compete with WFA.

The Commission, in the Report by Division 3, unanimously approved the reduced rates and found they were "just and reasonable." (J. S. Appendix, pp. 10a-15a). In the Report on Reconsideration, the Commission affirmed the findings of Division 3 and found that the reduced rates were "not otherwise unlawful." (J. S. Appendix, p. 23a) Seven of the nine participating Commissioners joined in

the decision.* The District Court unanimously held that:

> "The order of the Commission should not be disturbed, and the complaint is therefore dismissed." (J. S. Appendix, p. 10a).

Even as reduced, the freight charges are more than fully compensatory to WFA. The cancellation of the reduction tariffs, sought by appellants for the benefit of their members who compete with WFA, would restrict WFA's ability to compete for shipments. The Commission stated:

> "It thus appears that the rates as proposed would yield substantially more than full cost plus a reasonable profit. On this record, we can not find that the suspended schedules constitute a destructive competitive practice." (J. S. Appendix, p. 15a)**

The Commission also reviewed WFA's operations which had been questioned by appellants and concluded that "there is no merit in the protestant's argument." (J. S. Appendix, p. 23a)

The District Court stated two independent grounds for dismissal of appellants' suit. One was the plaintiffs' lack of standing to sue and the other (discussed at greater length in the opinion) was the lack of merit in the attack on the Commission's order. We understand that the Gov-

* One dissented solely for reasons stated in his previous dissent in *Forwarder Volume Commodity Rates Between Chicago and New York*, 310 I.C.C. 199 (J. S. Appendix, p. 24a). The Commission's decision in that case, however, was subsequently approved by this Court. *Eastern Express, Inc. v. United States*, 369 U.S. 37 (1962). Appellants quote and rely on the dissenting opinion in that earlier case (J. S. 27-28), without referring to this Court's decision.

** Congress has admonished the Commission to give due consideration "to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; * * *" (Section 406(d); 49 U.S.C. Sec. 1006(d)).

ernment and the Commission will discuss the former in their Motion to Affirm; we will therefore direct our discussion to the lack of merit in the complaint.

The reduced rates are on three levels, varying in amount depending upon the point at which the particular consignee desires to accept delivery of his shipment. A table showing these three levels of reductions is in the Report of the Commission (J. S. Appendix, p. 12a). One level (Note C in the table) applies when the consignee asks WFA to bring the goods to the consignee's store door. The second level of charges (Note B) applies to a consignee who does not want his shipment brought by WFA to a store door but, instead, wants to pick it up at WFA's terminal dock after it has been unloaded from the rail car. The goods, of course, are his to do with as he wishes after he accepts delivery at the dock.

It is reasonable and lawful in the views of WFA, the Commission and the District Court that the man who wants to take his shipment at WFA's terminal dock need not be required to pay WFA as much as the man who calls upon WFA to bring a shipment through the streets for a store-door delivery. The appellants disagree. They claim that Section 402(a)(5) of the Act* should have been construed to require WFA to publish only one rate, providing for store-door delivery, so that the consignee who takes delivery at WFA's dock (or the shipper of such a shipment) must pay as much as if the forwarder loaded the shipment into a truck and hauled it to a consignee's store door. They make the same argument regarding the reduction in Note A of the table (J. S. Appendix, p. 12a), which sets out a third level of reductions, to apply when the consignee wants to accept delivery from the forwarder

* That section (49 U.S.C. Sec. 1002(a)(5)) is quoted at J. S. pp. 3-4 and in the District Court's opinion, J. S. Appendix pp. 4a-5a.

while the shipment is still in the rail car and take it out and away by himself. He, too, they say, should be made to pay as much as the man who calls upon WFA to transport his shipment to his store door.

Implicit in part of appellants' argument is a contention that WFA, to retain its status as a freight forwarder under Part IV of the Act, must deny delivery of a shipment to a consignee who wants to take possession of his goods at the dock or in the car, and that WFA must insist on retaining the shipments until they have been delivered at the consignee's store door, although this is not entirely clear from appellants' contentions. Either by having to charge as much for shipments delivered in the car or on the dock as for shipments delivered at the store door, or by having to refuse the consignee access to the goods before they have been taken to a store door, WFA would be seriously hampered in providing and competing for the transcontinental transportation service on those shipments, to the benefit of appellants' motor carrier members. The shipping public also would suffer. As the District Court said:

> "Plaintiffs seek in effect to deny consignees access to freight forwarder service altogether in those instances when a consignor prefers to make delivery and a consignee considers it prudent or profitable to undertake such unloading and delivery operations himself. This might well be the case where particularly fragile or delicate goods are involved, or when the consignor or consignee considers himself otherwise better equipped to carry on those particular jobs." (J. S. Appendix, p. 8a)

The Commission and the District Court held that Congress has not enacted the prohibitive restrictions against the freight forwarders and the shipping public which are urged by the appellants. The decision clearly is correct. Moreover, there is nothing new in the principle that a for-

warder properly can turn the shipments over to the consignee without taking them to the consignee's store door and can publish appropriate rates for such service. In 1953, the Commission held that the operations of a forwarder whose tariff provided for delivery *only* at the forwarder's terminal were within the operations of a freight forwarder as defined in the section of the Interstate Commerce Act on which appellants here rely. The Commission in that case said:

> "A freight forwarder must publish rates and assume responsibility for shipments from point of receipt to ultimate destination, but there is nothing in this definition [Section 402(a)(5)] which requires it to perform, or to provide for the performance of a pickup and delivery service." *Barge Service Corp. Freight Forwarder Application*, 285 I.C.C. 249, 253, aff'd on reconsideration in 285 I.C.C. 309 (1953).

Section 402(a)(5) has no provision whatever that the break-bulk and distribution operations of a forwarder require delivery somewhere away from the forwarder's terminal dock or somewhere outside of the car in which the shipments were transported. Nor does the section require, as to every single shipment, that the forwarder must actually perform each of the functions that the forwarder is authorized to perform "in the ordinary and usual course of its undertaking." As the District Court properly held:

> "No reason appears to require a view that the break-bulk and distribution operations are always distinct, always occur in a certain order, and may never be consummated coincidentally or concurrently. We think it within the purview of statutory policy to consider that the freight forwarder has appropriately performed whatever his break-bulk and distribution functions may be when he has made a shipment available to a consignee at the destination terminal and, at consignee's option and request, relinquished control over the ship-

ment to the consignee to do with it as the latter sees fit under the contract." (J. S. Appendix, p. 9a)

Appellants also urge (J.S. pp. 25-6) that since railroads sometimes supply two or three small refrigerator cars to WFA (or to any other shipper) instead of the one boxcar ordered, and sometimes haul one of those small cars directly to the ultimate destination of the contents (rather than following the billed instructions to stop at WFA's assembly point and terminal point), the Commission should have rejected WFA's rate reduction tariffs on the theory that WFA is not a "freight forwarder" as defined in Section 402(a)(5) of the Act. Appellants' theory, held by the Commission and the District Court to be without merit, would eliminate WFA as a competitor of appellants' members where the railroads either decide or have the option of deciding that it would be more economical and efficient for them to handle some of WFA's shipments differently from the billing.

While "[t]he railroads, under their tariffs, reserve the right to transport a single carload shipment of merchandise in two or three refrigerator cars in lieu of one boxcar" (J.S. p. 25), the Commission noted that this right, when exercised, is "To facilitate the return of refrigerator cars to the west coast, and with pay loads * * *" (J.S. Appendix, p. 22a). WFA orders a boxcar for a consolidated carload shipment consisting of individual shipments of WFA's customers, either to load all of the carload shipment at its assembly point such as the one at Pittsburgh or to receive part of the load from a WFA customer at an outlying point and the rest by stopping at Pittsburgh (J.S. Appendix, p. 23a). If the handling is in the normal course in accordance with WFA's billing, "There is then no question that consolidation is practiced" (Commission, J.S. Appendix, p. 23a). If the railroad finds it desirable in its

operations to send refrigerator cars instead, it spots them at Pittsburgh when the entire load is there, or spots one at the outlying point and the other one or two at Pittsburgh.* In the split-load situation, when the refrigerator car or cars at Pittsburgh can handle the part of the load there, no useful purpose is served by stopping that car from the outlying point at Pittsburgh and the railroad therefore, for efficiency and economy, may decide to haul it west without stopping. At WFA's western terminal, such as Los Angeles, the various individual consignees of WFA, regardless of whether one boxcar or two or three refrigerator cars were supplied by the railroads, can get delivery from WFA of their individual shipments, pursuant to their desires as previously described above. If the carload shipment was billed to stop at Los Angeles for partial unloading, the rest to go on in the boxcar to a consignee at an outlying point, then if refrigerator cars are used by the railroads and if it happens that all of the goods in one of the refrigerator cars are destined to the outlying point, the railroad, if it wishes, can save itself unnecessary switching expense and can speed up the return of the empty car to it by taking that car to the outlying point without stopping at Los Angeles.

Appellants' argument that the Act forbids WFA from supplying freight forwarder service, and filing rates therefor, because the railroads have and sometimes exercise their reserved rights described above, is clearly erroneous. The Commission, after noting, in part, that the refrigerator car handling was not the normal handling, stated:

> "The fact that rules of the carriers performing the underlying transportation (which are not here in issue

* Under a railroad's "marriage" rules, it may also elect to supply two boxcars where only one car has been ordered. (J. S. Appendix, p. 23a).

but which are for their convenience) at times obviate the handling that otherwise would be performed, does not render the respondent's operations unlawful. We regard these operations as those of a freight forwarder as defined in the act. Thus, there is no merit in the protestant's argument." (J. S. Appendix, p. 23a)

The District Court, affirming, stated:

"The plaintiff Associations' objections to these operations cannot be upheld. With regard to instances where a consignor partially loads a boxcar himself and direct shipment thereafter prevents normal consolidation operations by the freight forwarder, who has no contact with the car whatever, we find nothing in the act which commands otherwise, nor do we observe that the national transportation [policy] is contravened by the practice. This practice, it is to be remembered, results from the operation of railroad and not freight forwarder rules, and moreover will be the exceptional and not the usual procedure." (J. S. Appendix, p. 7a)

Six years ago, in a rate case involving WFA itself, the Commission described WFA's operations of the kind involved here, including the use of refrigerator cars, movements of cars to western outlying points without actual stopoff, and loading by a shipper into a car furnished by WFA, and held that while certain changes should be made in the rates then in effect, the operations were freight forwarder operations under the Act. *Acme Fast Freight, Inc.* v. *Western Freight Association*, 299 I.C.C. 315, 322-3, 326-7 (1956). In 1943, only a year after enactment of Part IV, the use of multiple cars for freight forwarder shipments, to serve the convenience of the carrier, was approved, the Commission noting that "the usage of the business and sound railway or motor operating practice may require that all of the consolidated consignment be not necessarily forwarded in the same car or truck." *Consolidation of Shipments by Freight Forwarders*, 256 I.C.C.

306, 317 (1943). Indeed, the Commission's representative at the Congressional hearings preceding enactment of Part IV described what a freight forwarder actually did as including operations involving the railroad rule "that if the shipper orders a large car the railroad may, for its convenience, furnish two smaller cars instead," and operations where cars were billed by forwarders to stop for completion of loading at an intermediate point but were handled by the railroads direct to destination,* and the Commission itself, in presenting the draft of Section 402 (a)(5) in substantially its present form, stated expressly that the section "describes what a freight forwarder actually does."**

With respect to any carload consignment by WFA, the various individual shipments of WFA's customers together make up that consignment, including any part of a consignment that originates at an outlying point, and the rate charged by the railroad is the same either way the railroad elects to handle the consolidated carload consignment (J.S. Appendix, p. 7a fn.). Section 402(a)(5) does not say that assembly and consolidation, or break-bulk and distribution, must include placing the individual shipments in one car or coupling together the two or three cars that the railroads may supply to handle the consignment. As the Commission stated, the operations of WFA, including the ones where the railroad elects to exercise its operating option, are "those of a freight forwarder as defined in the act" (J.S. Appendix, p. 23a).

* Hearings before a Subcommittee of the Committee on Interstate Commerce, United States Senate, 76th Cong., 3rd Sess. on S. Res. 146 (1940), pages 27, 31, 32.

** Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 77th Cong., 1st Sess. on H.R. 3684, a Bill to Amend the Interstate Commerce Act, as amended, to Provide for the Regulation of Freight Forwarders, p. 130.

None of the Commission or court cases cited by appellants involved the railroads' optional 2-or-3-for-1 car rule or the stops for partial loading or unloading and, as is reflected in the reports and opinion herein, none was inconsistent with the decision here. Moreover, as the District Court stated, denying appellants' assertion that the National Transportation Policy (J. S. p. 3) is opposed to these operations: "That aspect of the national transportation policy which seeks to promote more efficient service is clearly well served by the operations which may be undertaken under the freight forwarder rate schedule which the Commission has here approved." (J. S. Appendix, p. 9a).

For the reasons stated above, the unanimous decision of the District Court should be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

Respectfully submitted.

D. Robert Thomas
Harry C. Ames, Sr.
Giles Morrow
S. Sidney Eisen
James L. Givan

Attorneys for Appellee Freight Forwarders

Sidley, Austin, Burgess & Smith
11 South La Salle Street
Chicago 3, Illinois

Of Counsel

November 1, 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 479

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., AND ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court [1] which dismissed appellants' complaint seeking to set aside an order of the

[1] The final judgment is not printed in appellants' Jurisdictional Statement. The opinion of the district court is printed at pp. 1a–10a therein.

Interstate Commerce Commission. Appellants are incorporated associations of motor common carriers (J.S. 2a). The order of the Commission which they sought to enjoin authorized Western Freight Association, a freight forwarder, to reduce its rates for shipments of 20,000–30,000-pound minimum weight (J.S. 1a).

Freight forwarders are regulated by the Interstate Commerce Commission under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001, *et seq.* Typically, they assemble and consolidate separate consignments of freight and tender them as a single unit via motor, rail or water carrier to a destination at which they separate the individual consignments and distribute them to the respective consignees. Forwarders are thus shippers in relation to the line-haul common carriers whom they patronize. They pay normal rates but, by reason of the discount for volume shipments allowed in the line-haul carriers' tariffs, pay less than the total their customers would have to pay for separate shipments of the goods. Charging rates somewhat lower than those which the line-haul carriers would charge for separate shipments, the forwarders derive their profit from the difference between those rates and the still lower volume rates which they themselves pay.

By tariff schedules filed with the Commission to become effective on October 26, 1958, Western Freight Association published reductions in numerous commodity rates based upon weight minima of 20,000–30,000 pounds (J.S. 11a). The reductions were initiated to reflect the cost savings inherent in the bill-

ing of a single large shipment compared with the billing of multiple shipments aggregating the same weight, as well as the greater ease provided by large shipments in the loading of heavier cars (J.S. 14a). Upon the protest of appellants, a few of whose members compete with Western for the traffic covered by the reductions (Pl. Reply Br. in the district court, p. 2), the Commission suspended the proposed schedules (J.S. 20a). Appellants charged that under Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), forwarders are required to operate by assembling and consolidating so-called small shipments for line-haul as a single unit and by deconsolidating and distributing the separate consignments at destination, while under the proposed rates the forwarders were enabled unlawfully to accept full truckload or volume shipments without performing those functions (J.S. 21a–22a). They further charged that certain car service rules adopted by the railroads performing the line-haul deprive the service rendered under the proposed reductions of the characteristics of forwarder service (J.S. 22a). Under these rules, the railroad may provide two or three smaller refrigerated cars to a forwarder in lieu of a single boxcar into which the consolidated shipments are normally loaded, and may provide separate cars spotted for loading or unloading parts of a single consolidated shipment at different points when the consignor or consignee of the goods chooses to load or unload them himself (J.S. 22a–23a). Finally, appellants argued that the diversion of traffic which would allegedly result from the proposed rate reductions made the reductions a destructive competitive prac-

tice in violation of the National Transportation Policy, 49 U.S.C. preceding 1 (see J.S. 22a).

On May 18, 1959, after an evidentiary hearing, Division 3 of the Commission issued a report and order in which it held the rates lawful and ordered the proceedings discontinued (J.S. 10a–16a). It found that the rates as reduced would yield "substantially more than full cost plus a reasonable profit" and therefore did not constitute a destructive competitive practice (J.S. 15a). The rate suspensions expired on May 22, 1959, and the proposed reductions became effective (J.S. 20a). On September 24, 1959, the full Commission denied reconsideration (J.S. 17a).

Appellants filed their complaint in the district court on June 3, 1960. Three weeks later, on June 23, the Commission *sua sponte* reopened the proceedings for reconsideration (J.S. 18a). On December 19, 1960, it issued its report on reconsideration (J.S. 19a–24a). The Commission adopted the findings with respect to costs and revenues contained in the prior report (J.S. 21a) and held further (1) that nothing in the Interstate Commerce Act prohibits a forwarder from handling volume shipments at reduced rates if it can handle them more economically than several smaller shipments (J.S. 22a); (2) that "normally" the service provided by the railroads would not be applied to obviate the necessity of consolidation and deconsolidation by the forwarder, so that operations under the rates as reduced would be those "of a freight forwarder as defined in the act" (J.S. 23a); and (3) that the rates were fully compensatory and not a destructive competitive practice (*ibid*). In holding that forwarders

were entitled to establish reduced rates for volume shipments, the Commission relied (J.S. 21a) upon its earlier decision in *Forwarder Volume Commodity Rates, Chicago and New York*, 310 I.C.C. 199, affirmed, *Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed *per curiam*, 369 U.S. 37.

The district court entered its judgment dismissing the complaint on June 7, 1962. It found that appellants, who did not themselves compete with freight forwarders for the carriage of goods but were merely associations of motor carriers, lacked standing to bring an equity suit against the Commission's order in the district court under the Urgent Deficiencies Act, 28 U.S.C. 1336, 2321–2325 (J.S. 2a–4a); that the evidence showed that the railroad car service rules would cause only occasional departures from the normal process of consolidation and deconsolidation under the rates at issue (J.S. 8a); that the statute does not require forwarders to perform the functions of consolidation and deconsolidation on those infrequent occasions when for the convenience of the railroads or the forwarders' customers those functions are neither necessary nor requested (J.S. 8a–9a); and that the National Transportation Policy is "well served" by the reduction of rates to reflect lowered costs when, as here, no destructive competitive effects ensue (J.S. 9a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. The district court properly held (Pet. App. 2a–4a) that appellants (which are trade associations of

carriers[1] failed to assert an interest in the Commission's order sufficient to support a suit in equity to enjoin the order. They are not shippers being forced to pay unreasonable or unlawful charges, nor are they competitors whose ability to compete effectively has been curtailed. Indeed, three-judge district courts have in the past dismissed, for lack of standing, complaints against Commission orders brought by trade associations of interested parties. See *Institute of Scrap Iron & Steel, Inc. v. United States*, No. 672–54 (D.D.C., May 26, 1954); *National Fisheries Institute, Inc. v. United States*, No. 524–51 (D.D.C., May 13, 1952).

Appellants do not gain standing to sue as representatives of their carrier members. (see J.S. 8–10, 12–13). This is not a class action authorized by Rule 23(a)(3) of the Federal Rules of Civil Procedure, on which appellants rely (J.S. 12 & n. 3). An association composed of persons, some of whom have an interest, cannot maintain a class action to assert the rights of its members. *Farmers Co-op. Oil Co. v. Socony Vacuum Oil Co.*, 133 F. 2d 101, 103–104 (C.A. 8); *National Hairdressers' & Cosmetologists' Ass'n*

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[1] Standing to challenge orders of the Interstate Commerce Commission, unlike those of most other administrative agencies, is governed by no special statute. Review may be had only in ordinary suits in equity in the district courts. 28 U.S.C. 1336; 49 U.S.C. 17(9); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 415.

While the record is silent on the point, it appears that only two or three of appellants' members have authority to operate directly between the areas involved in the challenged order. The A.T.A. Motor Carrier Directory (1962); Motor Freight Directory (New York ed., 1962), pp. 55–59.

v. *Philad Co.*, 41 F. Supp. 701, 708 (D. Del.), affirmed, 129 F. 2d 1020 (C.A. 3); *Alabama Independent Service Station Ass'n, Inc.* v. *Shell Petroleum Corp.*, 28 F. Supp. 386, 390 (N.D. Ala.). Nor have appellants been "expressly authorized" to bring the present equity suit (see J.S. 12). The general powers conferred by their members do not give them standing as attorneys in fact entitled to sue under Rule 17(a). See 3 Moore, *Federal Practice*, p. 1351 (2d ed., 1948); *Hickey* v. *Illinois Central Railroad*, 278 F. 2d 529, 532 (C.A. 7), certiorari denied, 364 U.S. 908; *Bell* v. *Preferred Life Assurance Society*, 131 F. 2d 516, 518 (C.A. 5), reversed on other grounds, 320 U.S. 238.

While we believe that the district court correctly held that appellants lack standing to bring this equity action, we recognize that this precise issue has not been decided by this Court. This consideration notwithstanding, we believe that the judgment should be summarily affirmed. The court below went on to consider the merits, and it was plainly correct, as we shall urge, in concluding that appellants' case was insubstantial, especially in light of *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming 198 F. Supp. 256 (S.D. Ind).

2. Appellants argue (J.S. 18-25) that the volume shipments covered by the assailed rates are assembled by shippers and broken into smaller lots by consignees, so that forwarders will not perform the functions described in Section 402(a)(5) of the Interstate Commerce Act, 49 U.S.C. 1002(a)(5). This, they contend, violates the statute which requires forwarders to offer and actually to perform all such functions

with respect to every shipment (Pet. 21, 24; see Pet. App. 9a). But this Court only last Term held to the contrary and affirmed the right of freight forwarders to publish special reduced rates for handling volume shipments in a manner similar to that at issue here. *Eastern Express, Inc.* v. *United States*, 369 U.S. 37, affirming 198 F. Supp. 256 (S.D. Ind.).

The other characteristics of the challenged rates to which appellants object are irrelevant to the legality of the rates under Section 402(a)(5). In allowing a reduced rate when a shipper or consignee prefers to load or unload, the forwarder merely passes on to the consumer of transportation services the cost savings realized. The option to dispense with these elements of the service lies with the shipper or consignee, not with the forwarder, who must perform them if requested to do so. The reductions granted when those elements are performed by the shipper or consignee prevent violation of the statutory prohibitions against discrimination and the granting of allowances not contained in filed tariffs which would result from the performance of a lesser and a greater service at the same rate. Section 404(b), 49 U.S.C. 1004(b); Section 415, 49 U.S.C. 1015. The district court correctly held that "the freight forwarder has appropriately performed whatever his break-bulk and distribution functions may be when he has made a shipment available to a consignee at the destination terminal and, at consignee's option and request, relinquished control over the shipment to the consignee to do with it as the latter sees fit under the contract" (J.S. 9a).

Similarly, the operation of railroad car service rules over which the forwarders have no control, and which only occasionally will obviate the necessity for consolidation and deconsolidation by the forwarder, cannot affect the legality of the forwarder rates themselves. The statute requires only that these functions be performed in the "ordinary and usual course" of forwarder operations. The statutory requirement is met when the forwarder holds itself out to perform these functions and in fact normally performs them. Here the district court found that "the occasional departure from this norm of actual consolidation and distribution is not so seriously nor so frequently at variance with the literal language of the Act as to outweigh the benefit to the shipping public" provided by the challenged rates (J.S. 8a). Moreover, the impact of the railroad rules upon forwarder operations was well known to Congress when it enacted the statute regulating the forwarder industry. See *Freight Forwarding Investigation*, 229 I.C.C. 201, 226, 241-243; Hearings on S. Res. No. 146 Before a Subcommittee of the Senate Interstate Commerce Committee, 76th Cong., 3d Sess., pp. 32, 341. The district court's affirmance of the findings of the Commission with respect to the operation of the car service rules does not warrant review by this Court (*Radio Corp. v. United States*, 341 U.S. 412, 420), and the interpretation of the statute by the Commission and the Court below was plainly correct.

3. Appellants cannot prevail in their attempt to overturn the Commission's evaluation, on the record

before it, of the bearing of the National Transportation Policy on the rates in issue. There is no specific statutory impediment to the establishment of these forwarder rates. Rather, the National Transportation Policy establishes the public interest in making available the competitive services of different transportation agencies. *Schaffer Transportation Co. v. United States*, 355 U.S. 83. Nor is there any question of encroachment upon any "inherent advantages" of appellants' members which the National Transportation Policy seeks to protect. First, this is in no sense a case of a higher-cost transportation agency undercutting the rates of a lower-cost agency. Appellants have never discussed costs, nor have they challenged the Commission's finding that the assailed rates are fully compensatory. Second, appellants have never attempted to prove that these forwarder rates will infringe any inherent advantage of superior service which their motor carrier members may possess. Indeed, there was no attempt by appellants to prove that any such inherent advantages even exist.

It is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy. The policy directs the Commission to foster "economical and efficient service," and cannot be deemed to require the forwarders to maintain rates at an artificially high level merely to protect the traffic of the motor carriers from fair and non-destructive competition, thereby depriving the public of forwarder service at competitive rates. See Section 15a(3) of the Act, 49 U.S.C. 15a(3). As previously noted, the Commission expressly concluded

(J.S. 23a), "there is no basis on this record for finding that [the assailed forwarder rates] constitute a destructive competitive practice," a conclusion with which the district court agreed (J.S. 9a). Moreover, the implementation of the National Transportation Policy is a matter uniquely for the Commission, and when, as the district court found to be the case here (J.S. 7a–10a), the agency's findings are both rational and supported by substantial evidence, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88; *Schaffer Transportation Co.* v. *United States, supra*, 355 U.S. at 92.[4]

[4] The dissenting opinion of Commissioner Walrath upon which appellants rely (J.S. 28) for their National Transportation Policy argument was rejected by the Commission in an order which was affirmed by this Court only last Term. *Forwarder Volume Commodity Rates, Chicago and New York*, 340 I.C.C. 199, affirmed, *Eastern Express, Inc.* v. *United States, supra*.

CONCLUSION

For these reasons, the judgment should be affirmed.
Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
ROBERT B. HUMMEL,
JOEL E. HOFFMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

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No. 479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *Appellants*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Appellees*

On Appeal From the United States District Court For the District of Columbia

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

FREDERICK A. BABSON, JR.
BRYCE REA, JR.
919 Munsey Building
Washington 4, D. C.
Attorneys for Appellants

November 23, 1962

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On Appeal From the United States District Court For the District of Columbia

---

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellants submit this Brief in opposition to appellees' motions to affirm the judgment of the district court.

ARGUMENT

APPELLEES HAVE ESTABLISHED NEED FOR REVIEW

The Briefs of appellees in support of their motions to affirm have established that this appeal raises important questions of administrative law which can be resolved only by this Court's plenary consideration.

I. APPELLANTS' STANDING TO SUE

On the issue of appellant associations' standing to bring this suit on behalf of its members in the court below, the Government[1] states: "[W]e recognize that this precise issue has not been decided by this Court." (Government's Motion, p. 7.) The freight forwarders, in their Brief, do not support the holding of the court below in denying appellants' standing to sue, either by argument of their own or by adoption of the Government's argument on this point (Freight Forwarders' Brief, pp. 4-5, 11).

Although the aforestated admission of the Government would appear to constitute a major concession on this important issue, it is not. Rather, it is inaccurate, unless by "this precise issue" the Government is taken to have meant *this* issue of standing as presented by *these* appellants in *this case*. The irrefutable fact is that in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958), this Court squarely held that an association was "the appropriate party" to assert the rights of its members where "the association . . . is but the medium

[1] The United States of America and the Interstate Commerce Commission, who filed jointly a motion to affirm, will be referred to herein as the "Government"; the remaining ten defendants who also filed jointly a motion to affirm will be referred to as the "freight forwarders."

through which its individual members seek to make more effective the expression of their own views." *The Government failed even to mention, much less to distinguish, this decision in its Brief;* nor did it mention two cases in the District of Columbia Circuit which followed the *N.A.A.C.P.* decision, *viz., MacArthur Liquors, Inc.* v. *The Palisades Citizens Ass'n, Inc.*, 265 F.2d 372 (1959) and *Archbold* v. *McLaughlin*, 180 F. Supp. 175 (1960). All of these cases were cited and discussed in appellants' Jurisdictional Statement.

The Government apparently sought to overcome this Court's controlling decision in *N.A.A.C.P.* by (1) ignoring it and (2) citing *two unreported, district court* cases to the contrary, one of which was decided four years and the other six years before *N.A.A.C.P.* Both district court cases involved "trade associations" rather than organizations, such as appellants, which exist and operate only by virtue of Act of Congress and orders of the Interstate Commerce Commission approving their charters and by-laws, pursuant to which appellants perform for their members important duties imposed on the members by the Interstate Commerce Act. Furthermore, the merits of this case directly involve those duties, which in the case of both appellants relate to the fixing of prices for their members' transportation services.[2]

Rather than joining the issue on the *N.A.A.C.P.* principle, the Government misconceived appellants' suit as an attempted "class action authorized by Rule 23(a)(3) of the Federal Rules of Civil Procedure, on which appellants rely" (Government's Motion, p. 6). Appellants' only purpose in making a secondary reference to Rule 23(a)(3) was to illustrate the modern

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[2] See J.S. 13-14.

trend towards avoiding a multiplicity of litigation (J.S. 12 n. 3). The Government's treatment of this point, however, goes far towards establishing that appellants' suit in the court below may well have constituted a valid class action authorized by Rule 23(a)(3). In asserting the contrary, the Government cites *Farmers Co-op. Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942) as standing for the proposition that "an association composed of persons, some of whom have an interest, cannot maintain a class action to assert the rights of its members" (Government's Motion, p. 6). The cited case involved a treble-damage antitrust suit and the court's decision turned, not on any inherent, legal disability of the plaintiff association to vindicate the rights of its members, but rather on the fact that the plaintiff's members were damaged, if at all, in varying degrees and that, therefore,

> 'Common relief' is not the object of the suit as would be the case were an injunction its purpose. (133 F.2d 105).

Here, an injunction is precisely the relief which appellants sought in the court below.

The attempt of the Government to introduce extra-record evidence that only "two or three" of appellants' members have an interest in the instant case (Government's Motion, p. 6 n. 3) reflects a failure to appreciate that all of appellants' members are injured by an order of the Commission which unlawfully expands the competition of a competing mode of transportation. The intervention in support of the Government of nine freight forwarders in addition to the one which was the respondent before the Commission underlines the obvious fact that the impact of the Commission's order is industry-wide and is not restricted to "two or

three" motor carriers, or any other number, which compete directly with the one freight forwarder which initiated this controversy before the Commission.

Finally, it should be observed that appellees made no effort whatever to dispute appellants' contention that they possess standing to sue under the *Sanders* doctrine. In *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), this Court held that even though the suing party could not resist the grant of a license to another by the administrative agency on the ground that the resulting competition would work economic injury to him, such party nevertheless had the requisite standing to bring suit challenging the agency's order and to raise any relevant question of law in respect of such order. As shown on pages 16 and 17 of appellants' Jurisdictional Statement herein, the *Sanders* doctrine has been further developed by this Court in later cases and is recognized by eminent scholars as being of primary importance to the law of standing. As with the *N.A.A.C.P.* v. *Alabama* principle, *supra*, the Government apparently chooses to ignore, rather than argue, it.

II. LAWFULNESS OF COMMISSION'S ORDER

A. Contrary To Statutory Definition of Freight Forwarder

The challenged Commission order permits freight forwarders to hold out, and to perform, a service which does not include break-bulk and distributing operations at destination. The rate schedules approved by the Commission offer reduced rates to shippers and receivers of freight who will relieve the freight forwarders of these functions. The schedules provide for a freight forwarder service whereby shippers or receivers accept delivery of their freight at the freight forwarder's

terminal dock (thus relieving the freight forwarder of performing distribution to the consignee's door) or in the rail car (thus relieving the freight forwarder of performing both break-bulk and distributing operations). The schedules do not provide for this service only in extraordinary or unusual circumstances; rather, the service is held out as an ordinary and usual undertaking by the freight forwarder.

The court below held that the freight forwarders "will continue to hold themselves out as freight forwarders within the terms of the [Interstate Commerce] Act under this reduced rate schedule *even though in a precise sense*[1] *they may not break-bulk or distribute* . . . ." (J.S. 8a, emphasis added). The court so held despite the express language of section 402(a)(5) of the Act, the essence of which as here pertinent is that a freight forwarder is a common carrier which, "in the ordinary and usual course of its undertaking," *inter alia*, performs "break-bulk and distributing operations." (J.S. 4). The effect of the statute is to make each of these functions for a freight forwarder *sine qua non*, except in extraordinary or unusual circumstances.

At several points in its motion to affirm, the Government appears to have confused the issue in the instant case with that in *Eastern Express, Inc. v. United States*, 198 F.Supp. 256 (S.D. Ind) *aff'd per curiam*, 369 U.S. 37 (1962) (Government's Motion, pp. 5, 7, 8). There, the issue was whether freight forwarders lawfully could publish rates on volume shipments. Appellants have not raised such an issue in this case. Here, the issue is whether the Commission may approve rates which

[1] We do not understand Judge Burger's use of the phrase "in a precise sense," since the challenged rates contemplate that freight forwarders will not break-bulk or distribute in any sense.

provide for a service by freight forwarders which omits two functions expressly required of them by statute.

The Government takes a novel tack in this case when it seeks to leave solely to shippers the determination of what functions the various regulated modes of transportation shall perform. On page 8 of its Motion, the Government states:

> The option to dispense with these elements of the service lies with the shipper or consignee, not with the forwarder, who must perform them if requested to do so.

Under this theory, there would be little need for government regulation of the transportation industry. Freight haulers could with impunity publish passenger fares. Much less drastic deviations of the various modes of transport from their respective roles in the nation's transportation system have been struck down by the Commission and sustained by this Court. *Eastern Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944). The implication by the Government that the reduced rates are necessary to prevent unlawful discriminations among shippers (Government's Motion, p. 8) rests on the unfounded assumption, at least on this record, that all forwarder rates except the type here in issue are inherently discriminatory.

The argument of the forwarders that appellants have no regard for the consignee of "fragile or delicate goods" who prefers to take no chances with the forwarder's unloading and distributing his goods ignores the facts that (a) the shipper or consignee was free to choose a safer service, (b) the goods were assembled and consolidated by the same forwarder at origin, presumably without mishap, and (c) the goods moved across the continent in a railroad car.

B. Contravenes National Transportation Policy

The Government asserts that it is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy, in that appellants would require the forwarders to maintain rates at an "artificially high level merely to protect the traffic of the motor carriers." (Government's Brief, p. 10.) This is a strange argument, especially in view of the Government's admission that appellants have never attacked the level of the rates in issue. The question here is not one concerning the level of the forwarder rates but rather the services which those rates must comprehend. If the Commission may permit the forwarders to abandon their functions of breaking-bulk and distributing, presumably it may do likewise, as to any of the other elements set out in section 402(a)(5) of the Act. Such a drastic change in the role of any of the regulated modes of transportation should come from the Congress, which has defined their respective roles.

CONCLUSION

Appellants pray this Court to deny the motions to affirm and to require briefs and oral argument on the substantial questions presented by this appeal.

Respectfully submitted.

FREDERICK A. BABSON, JR.
BRYCE REA, JR.

919 Munsey Building
1329 E Street, N.W.
Washington 4, D. C.

Attorneys for Appellants

November 23, 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 479

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
and
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.
Appellants

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION
Appellees

On Appeal from the United States District Court for the District of Columbia

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PETITION FOR REHEARING OR FOR CLARIFICATION OF ORDER

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

Come now Appellants and, pursuant to Rule 58 of the Rules of this Court, file this petition for rehearing or clarification of the decision rendered December 17, 1962 affirming a judgment of the United States District Court for the District of Columbia which dismissed Appellants' suit to set aside orders of the In-

terstate Commerce Commission. In support of this petition Appellants say as follows:

This case presents two distinct and wholly unrelated questions. First, do Appellants have standing to seek judicial review of the challenged orders of the Interstate Commerce Commission? Second, may a freight forwarder as defined by Section 402(a)(5) of the Interstate Commerce Act lawfully hold itself out to the public to perform and in fact perform in the usual and ordinary course of its business a lesser and different service than it is authorized to perform pursuant to its permit issued by the Commission? The District Court answered the first question no and the second question yes.

The United States and the Interstate Commerce Commission recognized in their motion to affirm that the question whether orders of the Commission may be judicially reviewed in a suit brought by an association of carriers who are adversely affected and aggrieved thereby is one of first impression in this Court (Motion to Affirm, P. 7). Indeed, it is one that, to the best of our knowledge, has never been considered by any federal court except the District Court in this case. It is certainly a question of vital and general significance, the clear answer to which by this Court is necessary to the proper exercise by the various district courts of their important jurisdiction to review orders of the Commission.

Rule 16 of this Court provides that it "will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument." We submit that the first

question upon which the decision of the District Court depends clearly does not fall within this language. It is not only a substantial question, but a difficult one. Indeed, the District Court referred to "contrasting studies which depict the complexity of problems of standing" and addressed itself to the second question presented because of "the importance of the case" and in recognition of the possibility that "we are in error on the issue of standing. . . ." (Appendix to Jurisdictional Statement, P. 4a).

The second question upon which the decision of the District Court depends, which for clarity of discussion was divided into two questions in Appellants' Jurisdictional Statement, is also substantial. Indeed, it goes to the heart of the scheme of regulation of interstate transportation embodied in the Interstate Commerce Act. Specifically, that question is whether freight forwarders may, *in the ordinary and usual course of their business*, render service which does not include assembly or consolidation or break-bulk or distribution, and is, therefore, for all practical purposes identical with the service rendered by common carriers by motor. A clear and authoritative answer to this question is necessary in order to delineate the role of freight forwarders in the national system of transportation, and to fix the limits of the scope of their operations within the meaning of Part IV of the Interstate Commerce Act and in the light of the command of the National Transportation Policy that the inherent advantages of each mode of transportation be recognized and preserved.

Since this Court's affirmance of a judgment, unlike the denial of a petition for a writ of certiorari, constitutes a conclusion that the judgment is correct, the

basis of affirmance should be perfectly clear. The basis of affirmance here is not clear, for there is no way of determining whether this Court agreed with the District Court's answer to the first question presented or with its answer to the second question presented or with its answers to both. The confusion thereby engendered is evident. Thus for example, *Traffic World*, the journal most widely circulated and relied upon in the transportation industry, reported this Court's decision at Page 85 of its issue of December 22, 1962 as follows:

> "A ruling of a federal district court upholding a decision of the Interstate Commerce Commission that volume rates of a freight forwarder applying on shipments ranging from 20,000 to 30,000 pounds were lawful was affirmed *per curiam* by the Supreme Court of the United States on December 17 in No. 479, National Motor Freight Traffic Association, Inc., and Rocky Mountain Motor Tariff Bureau, Inc. v. United States of America and Interstate Commerce Commission, et al.
>
> "The motor carrier organizations attacked the decision of the federal district court for the District of Columbia, asserting that where forwarders did not assemble and consolidate at origin and break bulk points and distribute at destination, they were not fulfilling the definition of a forwarder contained in the interstate commerce act. The lower court had also ruled that the motor carrier organizations lacked standing to maintain the action (T.W., Oct. 13, p. 116).
>
> "The court's *per curiam* decision carried a note that Justice Stewart was of the view that probable jurisdiction should be noted."

In contrast, United States Law Week reported this Court's decision at Page 3201 of its issue of December 18, 1962 as follows:

"No. 479. National Motor Freight Traffic Assn., Inc. v. U.S.

"Ruling below (USDC-DC, 205 FSupp 592):

"Motor carrier associations have no standing to seek judicial review of Interstate Commerce Commission order approving freight forwarders' published tariffs setting forth reduced rates for freight shipments of 20,000-30,000 pounds moving from Official Territory to Pacific coast. (Judgment affirmed.)"

Among this Court's great responsibilities are (1) the establishment of the principles and rules which will govern the district courts in the exercise of their jurisdiction and (2) the making of the final, authoritative and clear interpretations of federal regulatory statutes necessary to the proper administration of those statutes by regulatory agencies. We respectfully submit that in the circumstances here the summary affirmance of the judgment of the District Court falls short of the discharge of these responsibilities. Appellants therefore urge this Court to grant this petition for rehearing and set this case for briefs and oral argument. Alternatively Appellants ask this Court to clarify its *per curiam* order so as to make clear the basis upon which the judgment of the District Court was affirmed.

Respectfully submitted,

BRYCE REA, JR.
1329 E Street, N. W.
Washington 4, D. C.
Counsel for Appellants

Of Counsel:

WATKINS & REA
1329 E Street, N. W.
Washington 4, D. C.

CERTIFICATE OF GOOD FAITH

I, Bryce Rea, Jr., counsel in the above cause and a member of the bar of the Supreme Court of the United States, do hereby certify that the above Petition for Rehearing is presented in good faith and not for delay.

BRYCE REA, JR.